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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

19 Cr. 833 (SHS)

5 CAMERON BREWSTER and JENNIFER
6 SHAH,

7 Defendants.

8 -----x

Argument

9 July 23, 2021
10:40 a.m.

10 Before:

11 HON. SIDNEY H. STEIN,

12 District Judge

13
14 APPEARANCES

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17 Southern District of New York

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(Case called)

THE DEPUTY CLERK: Counsel and the visitors, spectators, everyone is reminded that, whether you are present in the courthouse or listening to this proceeding from elsewhere, the recording or rebroadcasting of it in any manner is prohibited by law.

Counsel, please state your names for the record.

MR. SOBELMAN: Robert Sobelman, Kiersten Fletcher, and Sheb Swett for the United States. Good morning, your Honor.

THE COURT: Good morning.

MR. SWETT: Good morning.

THE COURT: You may be seated in the back.

MR. POSCABLO: Ryan Poscablo, on behalf of Cameron Brewster, your Honor. Good morning.

THE COURT: Good morning.

MR. ALONSO: Good morning, your Honor. Daniel Alonso, Henry Asbill, and Priya Chaudhry on behalf of Jennifer Shah.

THE COURT: Good morning.

MS. CHAUDHRY: Good morning.

MR. ASBILL: Good morning, your Honor.

THE COURT: And are any of your clients here, gentlemen?

MR. ALONSO: Yes. Ms. Shah is sitting next to me, your Honor.

DEFENDANT SHAH: Good morning.

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1 MR. POSCABLO: Mr. Brewster is on the line, your
2 Honor, pursuant to your Honor's order.

3 THE COURT: Okay. Good morning to him.

4 All right. We have two motions. I will call them the
5 Brewster motion and the Shah motion. I would like to handle
6 the Shah motion first, and I will hear from the movant.

7 Let's handle the Shah motion. Go item by item. I may
8 ask questions, but in any event I will let the government
9 respond. I think that's the way to get some order here.

10 MR. ALONSO: Thank you, your Honor. If I may proceed.

11 THE COURT: Mr. Alonso, you will be dealing, all
12 right, with the motion.

13 Let's first handle the motion -- you will tell me if
14 you are withdrawing some of these issues, so that there is no
15 need to deal with them, to the extent the motion seeks a
16 dismissal of the superseding indictment. Go ahead. Speak to
17 that.

18 MR. ALONSO: So I will speak to that.

19 I just want to telegraph for the Court that I think
20 that four of our motions are actually quite intertwined, so I
21 may refer to some of them while I am talking about others.

22 So I think the motion for dismissal obviously is
23 paramount --

24 THE COURT: You are talking about subsections of your
25 motion.

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1 MR. ALONSO: No. I actually am saying that there are
2 themes that run through the motion to dismiss, the bill of
3 particulars, the motion for inspection of the grand jury
4 minutes, and the motion for *Brady* material. It all is related
5 to the fundamental question of what exactly the government is
6 charging here.

7 That's obviously very important in terms of the
8 dismissal of the indictment. It's crucial in terms of notice.
9 They simply haven't alleged appropriately the requisite intent
10 to harm the victims on the part of Ms. Shah in this indictment.
11 What the government has tried to do, as I think we pointed out
12 in quite some detail in both our opening memorandum and our
13 reply brief, but what the government has tried to do is simply
14 rest on, you know, cases that say that they do little more than
15 allege the elements of the crime and the time and place. But
16 the reality is, they have to do more. And there are a number
17 of cases --

18 THE COURT: Well, what they have to do is, they have
19 to state the elements of the offense, they have to inform the
20 defendant what she is charged with so that she can defend.
21 That's pretty straightforward, sir.

22 MR. ALONSO: It is straightforward.

23 THE COURT: It's not a high burden. It's an important
24 burden, but it's not a high burden. You have to know what you
25 are being charged with, and you have to know it in such a way

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1 that you can defend against it. You don't have to know each
2 and every aspect of it. She doesn't have to know, from the
3 standpoint of the request to dismiss, each material
4 misrepresentation. She doesn't have to know each of her
5 contact -- I'm sorry, the government doesn't have to set forth
6 in the indictment the list of the victims or the
7 representations, the false -- allegedly false representations
8 made to each victim. That is for other issues. We are talking
9 about the dismissal of the superseding indictment. The burden
10 isn't -- again, it is important, but I would characterize it
11 under the case law as not very high.

12 Would you accept that?

13 MR. ALONSO: I would accept that the case law says
14 what your Honor says, and I would also submit to your Honor
15 that the Second Circuit has either upheld or dismissed a
16 number of indictments under the standard that I am urging.

17 When they are setting forth a general -- a general
18 statute, like wire fraud and conspiracy, which are so
19 incredibly broad, they have to, in the words of the Supreme
20 Court in *Russell*, descend to particulars. I'm not saying they
21 have to set out all the things that your Honor just said.
22 Clearly that's correct. You don't have to set forth a bill of
23 particulars inside an indictment, nor have we asked for them to
24 lay out a road map to their evidence. What we are simply
25 pointing out is a fundamental defect in the indictment in that

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1 wire fraud requires a specific intent to harm, and here that
2 has not been alleged. What -- other than the boilerplate
3 elements of the indictment -- of the statutes have been
4 alleged, but they are not saying --

5 THE COURT: In other words, you do agree, as you have
6 to, that they do charge intent.

7 MR. ALONSO: Only when they are tracking the language
8 of 18 United States Code 1349 and 1343, right? There --

9 THE COURT: At no point -- I am quoting from paragraph
10 four. "At no point did the defendants intend that the victims
11 would actually earn any of the promised return on their
12 intended investment nor did the victims actually earn any such
13 returns."

14 MR. ALONSO: Correct. Those words are there, and I
15 will point your Honor to two things. One is, the government's
16 responses here mischaracterizes what that says. That does not
17 say what it should say. If they are going to allege a false
18 promise fraud case, like this one, they need to say, based on
19 ample case law going back over a hundred years, they need to
20 say, at the time of the promises made, they had no intention
21 specifically of performing.

22 That's not what they say here. They are saying
23 here -- the government mischaracterizes this in their response.
24 They are saying here that at no point did they form the intent
25 that good things would happen. They are not saying in this

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1 indictment that they formed the intent that bad things would
2 happen. The requirement is they have to intend to harm the
3 victims or the purchasers here. What they are saying is at no
4 point did they form the intent for them to make money.

5 That's not the same thing, your Honor. It really
6 isn't. And I think the reason it is so intertwined, and I
7 bring up these other things, it's intertwined because I'm not
8 sure they can allege this. Right? That's why the *Brady*
9 motion and the grand jury motion are so important. Because of
10 the material that we have uncovered that the government, you
11 know, claims they didn't have until the day of this indictment.
12 Not true. They have had it for years. The fact is that, at
13 the time that these promises were being made, as far as we can
14 tell, from the millions of documents that they have given us,
15 they are -- the purchasers were being in fact told, it was
16 being disclaimed that any promises were being made.

17 So I think that careful wording it's very cute but it
18 does not follow --

19 THE COURT: Wait just a moment. Go ahead. Go ahead.

20 MR. ALONSO: I'm saying I think that the careful
21 wording in the indictment, it is -- sorry, I have it over
22 there, it is the paragraph where you said at no point did they
23 intend, that careful wording is, I think, because they are
24 unable to allege what they really need to allege, which is that
25 the defendants specifically intended, right -- Ms. Shah,

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1 selling leads, you know, brokering leads to -- ultimately to
2 sales floors intended that those people would not make money
3 from this, when the government knows -- it has in their
4 files -- that they are being told exactly the opposite, that
5 nobody is promising you any particular return. So that
6 language --

7 THE COURT: But isn't that a jury issue as to what
8 they were told and what they weren't told?

9 MR. ALONSO: Of course. Of course. What they were
10 told and what they weren't told is a jury issue, but the
11 allegation has to be -- it has to be, your Honor -- that
12 Ms. Shah intended to harm each and every one of these people
13 whose leads she sold. And it seems --

14 THE COURT: Wait. The indictment has to say that she
15 intended to harm each and every person? No. You don't mean
16 that.

17 MR. ALONSO: Each and every person is a bit of
18 hyperbole. I apologize. She -- it has to allege --

19 THE COURT: The intent had to be there to harm
20 somebody.

21 MR. ALONSO: To harm them. Exactly. And given that
22 their theory is that they are being promised somehow -- I don't
23 know how you are promised returns on tax preparation services,
24 but be that as it may, the theory appears to be that they are
25 being promised, at the time of these sales, that they are

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1 going to make some specific monetary return. That appears to
2 be the theory. It's vague in the indictment, but that appears
3 to be the theory.

4 If that's the theory, then the indictment must
5 descend into particulars, and it must say that she did not --
6 that she specifically intended that they would be harmed,
7 which means she specifically intended they wouldn't make any
8 money.

9 They didn't allege that --

10 THE COURT: You may be -- perhaps your language is a
11 little too precise, that they wouldn't profit from it.

12 MR. ALONSO: That's not what they are saying. That's
13 not what they are saying. They are saying promised returns. I
14 don't know what that means. That's vague. So we are not
15 prepared to concede profit. Perhaps if we were drafting this
16 anew, perhaps that's what they meant. That's not where we are.
17 We have a grand jury who heard evidence and who returned these
18 exact words, so we are stuck with these words. So they are
19 saying the promised returns. So they did not properly allege
20 that Ms. Shah intended that they would not make the promised
21 returns. That's not what they are saying. They are saying at
22 no point did she form the intent that they would make the
23 returns. Those are two very different things.

24 THE COURT: Go ahead.

25 MR. ALONSO: There are cases in the Second Circuit,

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1 including in the wire fraud context. The *Shellef* case, that we
2 cite in our reply brief, is relatively on point, where the
3 Second Circuit applied this principle to wire fraud, where the
4 government had not laid out that the misrepresentations went to
5 the benefit of the bargain.

6 There are other cases -- the *Pirro* case is a famous
7 one, where Judge Parker dismissed that indictment, the Second
8 Circuit up held it. So there is not -- it is not enough, as I
9 think Judge Sand says, it's not enough to sort of say these
10 kind of generalities and then -- by the government, and then
11 say, okay, Judge, that's it. We rarely dismiss indictments in
12 this courthouse. I get it. We rarely dismiss indictments in
13 this courthouse. This is one that should be dismissed. Not
14 just for that reason. There is a second reason we allege it
15 should be dismissed, your Honor.

16 They didn't allege materiality. It is extremely
17 ironic that they are relying on all we need to do is allege the
18 elements, that's all we need to do, yet this element they
19 didn't allege.

20 THE COURT: When you are talking about an investment,
21 isn't materiality inferred? That is, you are making alleged
22 misrepresentations in regard to investment, it is -- the
23 alleged misrepresentation is you are going to make money, you
24 are going to profit.

25 MR. ALONSO: If this were a stock investment case or

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1 real investment case, I might agree. This is not an investment
2 case at all. This is a purchase of services. These are
3 contracts to purchase coaching services.

4 I expect the government will tell you that everyone
5 who bought coaching services got coaching services. Right?
6 That everybody who paid for whatever these business services
7 are -- again, we want them to particularize them -- but they
8 are not going to contest, I suspect, that they got what they
9 paid for.

10 So it's completely different than an investment case.
11 And, frankly, I don't know that it was material. We point out
12 in our --

13 THE COURT: I don't think -- we will hear from the
14 government.

15 MR. ALONSO: No, no.

16 THE COURT: I don't think they are going to say they
17 got what they paid for.

18 MR. ALONSO: No.

19 THE COURT: The argument -- if it's like the *Ketabchi*
20 trial --

21 MR. ALONSO: Yeah.

22 THE COURT: -- the argument is that they got some
23 piece of junk, as it were --

24 MR. ALONSO: I agree that there --

25 THE COURT: -- that allegedly is a coaching service or

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1 a business opportunity, but there was no substance to it. It
2 was a nothing. But they got something.

3 MR. ALONSO: I agree they are not going to concede
4 that there was, but the fact is that the contracts at issue did
5 contract for coaching services. I don't think there is going
6 to be any question that they got it. I don't think even these
7 prosecutors have alleged that substandard services are
8 criminal. What they are saying is, in connection with selling
9 these services, salespeople, not Ms. Shah, but salespeople
10 somewhere across the country, said things, like made promises
11 that people would be making money, not on their investments,
12 it's not an investment, on their fee that they are paying for
13 these services. Right? That's their theory.

14 And how -- first of all, they haven't said material.
15 I can show you lots of indictments within the Second Circuit
16 that say "by means of materially false and fraudulent
17 pretenses, representations, and promises." There are cases
18 that we have cited -- the *Ivic* case is one, there are others --
19 where implied elements of crimes are -- must be alleged. And
20 the element of materiality is not on the face of 1341. It must
21 be alleged.

22 The *Neder* case, the Supreme Court held that
23 materiality is an element of mail and wire fraud and bank
24 fraud, right? It wasn't so obvious in 2000, or 1999, whenever
25 that case was decided. It wasn't so obvious. Right? Because

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1 the Supreme Court had a circuit split before it. And it
2 decided materiality is an element.

3 Okay. Since then, you can see all around the country,
4 indictments say "materially false." Were these material or
5 not? That's -- that may be a question for the jury, but they
6 have to allege it in the indictment, and they didn't.

7 So if I can move on -- is there water somewhere?

8 THE COURT: I don't know if the government supplies
9 water. You know what, sir, let me give you mine. There you
10 are. I have not opened it. As a matter of fact, Ms. Blakely,
11 do we have a cup or something, where we can save some of the
12 judge's water for the judge?

13 MR ALONSO: Judge, I appreciate your kindness. You
14 don't have to --

15 MS. FLETCHER: Judge, the government --

16 MR ALONSO: -- do that.

17 MS. FLETCHER: We will supply water.

18 MR. ALONSO: I appreciate the government's kindness.
19 I'm glad she did it in open court, so everybody saw it. Thank
20 you very much, Ms. Fletcher.

21 Moving on to the bill of particulars motion, your
22 Honor, as I said, it is related, and it is basically related
23 because defending this case has been and will continue to be
24 like boxing with ghosts, right?

25 So the government has alleged a nine-year conspiracy

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1 to commit wire fraud with some unspecified number of
2 coconspirators, with unnamed, you know, sales floors, and with
3 victims that we don't know who they are. So when I say boxing
4 with ghosts, I really mean it.

5 They are pointing, they are saying, listen, you don't
6 need us to particularize. Literally, they have responded to
7 our request by, no, no, no, that's not really required. We
8 don't have to do that here, because we have given you a
9 boatload of discovery.

10 Now, they have given us a boatload of discovery.
11 That's clear. We have said in our -- I said in my declaration
12 more than a million pages. I think that grossly understates
13 it.

14 THE COURT: I saw that argument.

15 MR. ALONSO: It's millions and millions of pages.

16 Now, it is great that they gave that to us. A lot of
17 it is from *Ketabchi*, which, by the way, I submit has nothing to
18 do with this case. It may be a similar theory of theirs, but
19 we can't have a road map to what our trial is. We don't want
20 the evidence. We just want the particulars. What is he
21 charging -- what is he charging us with, the government? So we
22 can't do that from the *Ketabchi* case. It's completely
23 different. You know, it's completely a different matter with
24 different players.

25 So what we are asking for, we had originally asked for

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1 seven items. You said, your Honor, what are we abandoning? We
2 are now asking for five, right? In response to the -- our
3 motions, the government put forward a statement of facts, which
4 gives us at least a little bit of information. So what we are
5 asking for now is basically the coconspirators, the victims,
6 the sales floors, the money laundering activity, and one more
7 thing, which escapes me at this moment, but it's in my reply
8 brief.

9 So what is crucial here is basically to be able to
10 know what is it that we have to defeat, right? So in science,
11 you need -- a falsifiable proposition is something that can be
12 attacked. Right? Same thing in law. Right? So what are they
13 saying? Right? They are saying there are -- there are
14 literally thousands and thousands and thousands of names of
15 leads in the discovery materials. I don't know which ones
16 apply to Ms. Shah. I don't know which ones they are saying
17 were victimized. I don't know which ones they are saying were
18 intended to be victimized. So we could very easily pick out a
19 hundred of them, do a great job in front of the jury, and show
20 that those people were not defrauded at all, or certainly that
21 Ms. Shah knew nothing about it, what does she know about what
22 the sales floors are saying? We could show all that and then
23 they could come up and say no, no, no, it's these other 100
24 people we are alleging.

25 The point is, if you are going to allege that somebody

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1 is being victimized -- and here there is a sentencing
2 enhancement for it, right, which specifically talks about more
3 than ten victims over 55 -- if you are going to allege
4 somebody is being victimized, tell us who. Let's talk about
5 what we are trying here. Let's join issue. Otherwise, we have
6 millions of pages and we are almost literally at sea in terms
7 of wading through those pages.

8 Now, they said -- I anticipate that they will clarify,
9 but in their response, they said essentially that they allege
10 that some unspecified number of telemarketing operations with
11 which Ms. Shah allegedly worked were always defrauding people.
12 Now, if that's the case, I think they need to say that clearly.
13 That's not what they have said clearly.

14 And if they are saying that, then we have a different
15 issue. Right? Then we have an issue of, okay, well, what's
16 the case about? I mean, there are still millions and millions
17 of people here.

18 So I think they do need to clarify, and I would --

19 THE COURT: I'm not sure what that means, millions and
20 millions of people here.

21 MR. ALONSO: Well, millions and millions of pages
22 which shows thousands and thousands of victims in there.

23 And by the way, more than a hundred sales floors are
24 listed there. Which ones are we supposed to defend against?

25 THE COURT: Listed where?

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1 MR. ALONSO: Listed within the discovery. We have
2 cited --

3 THE COURT: In discovery.

4 MR. ALONSO: Yes.

5 And coconspirators. You know, there is very good
6 case law that the government hasn't really addressed about
7 factors courts are supposed to consider in terms of giving
8 over coconspirators. I want know who are we supposed to
9 defend against. This is not a case where there is any danger
10 here. Ms. Shah, obviously, is not somebody who poses a danger
11 to anybody. So it would not be difficult for the government to
12 tell us, okay, it's these ten people, it's not these other 20
13 people. That way we could all focus -- everybody here, your
14 Honor, us and the prosecution -- on what the case is about.

15 Also related, your Honor, if I could move on --

16 THE COURT: Go ahead.

17 MR. ALONSO: -- is the *Brady* issue.

18 THE COURT: Go ahead.

19 MR. ALONSO: So we obviously, we obviously had made a
20 point this morning and in our papers about what exactly are the
21 misrepresentations here. In the *Brady* context, it's been
22 clear, it's become clear, just from this motion practice, that
23 there is material out there that's favorable to the defense
24 that the government hasn't identified for us.

25 THE COURT: Wait. The -- I take it you are not

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1 arguing that -- or are you, that in the discovery material,
2 which you say is billions of documents, the government has to
3 tell you what is exculpatory and what's not. Is that your
4 argument?

5 MR. ALONSO: I am saying that in part. Right? I am
6 saying that in part and, I have some authority, which I am
7 happy to discuss with the Court. The issue is that, if you
8 have got this quantity of material, right, you can't expect the
9 defense to wade through it in a lifetime.

10 THE COURT: Indeed. I want to hear what the
11 government has told you -- because obviously there are things
12 the government has told you that the Court is unaware of -- in
13 terms of how that discovery has been organized and, indeed,
14 what they have -- the information they have given you about the
15 victims. So in broad view, yeah, they can't just dump things
16 on you for millions of pages. But I don't think you have
17 authority that says the government has to tell you what's
18 exculpatory and what's not.

19 MR. ALONSO: I do have some authority for that, your
20 Honor. I just don't have it this far in advance of trial.
21 Right? But I think the principle applies.

22 So there are two cases -- *Gil* in the Second Circuit
23 and *St. Germain* -- which is a case of Judge McMahon here in the
24 Southern District, which I have cited, where the government did
25 turn over material days before trial. In the *Gil* case, it was

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1 a memorandum that was buried among, you know, some 2700
2 documents. In the *St. Germain* case, it was transcripts that
3 were also -- that were similarly buried. Neither was
4 identified as what it was, which is something that was
5 specifically helpful to the defense.

6 And in the *Gil* case, the Second Circuit reversed that
7 conviction, even though the government argued -- and I know
8 this from painful experience. I argued the case on behalf of
9 the United States at least before the motion panel in *Gil*, and
10 the government argued that the document had been turned over.
11 The defense had it. They had it five days before trial.
12 That's what I argued to the Second Circuit. I lost, because
13 the Second Circuit said -- Judge Jacobs didn't like that the
14 government had buried it. I didn't try the case, so thank God
15 I'm not the one who buried it, but that it had been inside five
16 boxes of 3500 material, right, when it was something that was
17 clearly favorable to the defense.

18 In the *St. Germain* case, Judge McMahon made a similar
19 analysis.

20 But it all goes back to the *Bortnovsky* principle.
21 Right? This is the motion for a bill of particulars. Right?
22 *Bortnovsky* reversed a denial of the bill of particulars, and
23 your Honor is obviously familiar with the case I know --

24 THE COURT: I know *Bortnovsky*.

25 MR. ALONSO: -- and as I wrote in my papers, it was a

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1 quainter time when 4,000 documents was deemed to be a lot by
2 the Second Circuit. You can't just give 4,000 documents and
3 expect the defense to glean it. Well, we are well beyond 4,000
4 documents here.

5 So I think it is the same principle, and it is driven
6 home by what's happened just since this motion practice.
7 Right? In the motion practice, in the *Franks* motion, which we
8 are abandoning, because the government has represented that
9 they are not going to offer anything that was seized pursuant
10 to those two warrants, so we are abandoning that, but because
11 of that motion practice, and some of those facts related to the
12 grand jury motion as well, it has become clear that there is
13 exculpatory material within the discovery material and there
14 may be things outside of it. Right? It's not just the
15 evidence that they have given us. The discovery material are
16 things -- are documents and presumably things they might try to
17 introduce or other.

18 But generally speaking, they haven't given us notes
19 and memoranda and things like that. They have given us some of
20 it. But what the government did in its response is it said to
21 the Court, Ms. Shah's lawyers identified a document, one
22 document, which is a compliance coaching script, and that
23 document, which we did identify, we said, look, this document
24 says that the promises of returns -- the central theory of the
25 case -- were specifically being disclaimed at the time of the

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1 sale. They may argue as a factual matter that that was part of
2 the scheme. Maybe they will say that. But certainly it is
3 something that goes to materiality, goes to intent to defraud,
4 goes to fraud in itself, and we are entitled to have that.

5 So when you have got the theory that --

6 THE COURT: This is a 2011 document that you have
7 attached to your papers?

8 MR. ALONSO: Yes.

9 THE COURT: All right.

10 MR. ALONSO: Exactly right. And if I could finish,
11 because this is, I think, actually very, very important.

12 This kind of information that promises were
13 specifically disclaimed at the time of sale, if the theory is
14 promises were specifically made at the time of sale, it's
15 clearly favorable to the defense. Maybe they have a way to
16 defeat it, maybe they don't. It's clearly favorable. We
17 identified the one document, a cursory review, because I
18 thought -- I think there is something in here. Let's find it.
19 Of course, we found one document. Okay? We attached it to our
20 papers.

21 The government comes back and says, that document
22 doesn't prove anything, because we only got that document on
23 March 25, 2021. That happens to be the date of the indictment
24 in this case, so I doubt it was presented to the grand jury,
25 but they got it on that day.

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1 We then went back to the drawing board and said, wait
2 a minute, that doesn't make any sense. In a case of false
3 promises of returns, how could they only have gotten this
4 document the day they went to indict Ms. Shah? And the answer
5 is they didn't. They have had it for years. We found it in
6 the very first *Ketabchi* production that they made, right? So
7 they have had that document for years.

8 And what's more, it doesn't make sense that there is
9 just one document. Right? They say in their response that we
10 only identified two documents -- a contract and one script.
11 Okay. So we went back to the drawing board and we found eight
12 more. It's all attached to our papers now. So it's clear that
13 there is lots of stuff like this out there, probably not just
14 within the discovery material, which they should identify for
15 us, but also within the heads of the agents. Right?

16 The agents say in the affidavits, and probably before
17 the grand jury, they interviewed a hundred people and none of
18 them made any money. First of all, that's not fraud obviously.
19 The result by itself isn't fraud. But let's just take that
20 moment a moment.

21 Okay. But what about the people they didn't
22 interview? How did they decide not to? Who are they? Do
23 they know about people who made money or who will admit to
24 having promises disclaimed? Those are very important pieces.
25 And of course *Brady* material and *Giglio* material doesn't need

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1 to be written down. It has to be in the minds of the
2 investigative team, including all the agents.

3 So I think this is just a very, very important point
4 about that. Under the *Gil, Bortnovsky* principle, they have to
5 identify it, and I think that the Court should order them to
6 do a more thorough review for this exact piece, for this exact
7 piece about promises being made about returns.

8 Which brings me to my grand jury motion. Very well
9 aware, your Honor, that in this courthouse it is very rare for
10 the Court to go beyond a facially valid grand jury indictment,
11 which is, of course, presumed valid, putting aside the other
12 complaints we have about the face of this indictment.

13 Our motion papers, I think, have established pretty
14 clearly that the agents in this case pretty regularly either
15 made or passed on false statements about Ms. Shah about this
16 scheme in sworn affidavits to the magistrates. That is a
17 serious allegation. We don't make it lightly. But they told
18 the magistrates that the purchasers were promised returns on
19 their investments without saying -- without clarifying that
20 misleading statement, oh, listen, Judges, you should know,
21 there were conversations at the time and scripts and contracts
22 that said exactly the opposite of what we just swore to you.
23 They did not tell the magistrates that. They actually told the
24 magistrates, as well, that Ms. Shah operated two companies that
25 she didn't operate; that she was affiliated with, that she

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1 worked for, perhaps, but did not operate. And their attempt to
2 use operate --

3 THE COURT: What does "operate" mean when she is
4 listed, I think, as a vice president of marketing or something
5 of that nature? What does "operate" mean?

6 MR. ALONSO: Well, vice president of marketing, if you
7 look at that chart, is middle management. Right? It's not
8 the -- "operating" in terms of a company means --

9 THE COURT: Conceding your point for purposes of
10 discussion, I would say it's middle management as opposed to
11 middle management.

12 MR. ALONSO: Well, that's not what the agent said.
13 The agent didn't say anything like --

14 THE COURT: What does "operate" mean?

15 MR. ALONSO: "Operate" means what the Oxford English
16 dictionary says it means, which is that it means to work
17 machinery or to direct the activities of a company. Right?
18 That's what it says in the footnote where we cited the
19 dictionary --

20 THE COURT: So the operator is the CEO.

21 MR. ALONSO: It also -- actually, I think -- I think
22 the easiest way for everybody here to interpret --

23 THE COURT: Aren't you parsing it far too fine for
24 purposes of 6(e)? You started off by saying it's true that
25 review of grand jury minutes is rarely permitted here.

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1 MR. ALONSO: I think that --

2 THE COURT: Isn't this sort of, you will forgive me,
3 an eye shade approach to the word "operate"?

4 MR. ALONSO: I think that "operate" means what it
5 means in chief operating officer, but I will concede your
6 Honor's point that the much stronger point is the part about
7 no one -- that the statements no one made any money and the
8 statements about the promised returns. Right? There were
9 promised returns maybe, but there were also specific
10 conversations saying we are not promising you anything. That
11 wasn't -- I'm going to take -- it's a very reasonable inference
12 that those agents went in front of that grand jury and said
13 what's in the indictment, which is that they were not making
14 money on their promised returns, and that is a misleading
15 statement. I submit that if the government had heard that
16 statement in the grand jury from a subpoenaed witness and they
17 knew all of the information we have set out, they might start
18 an investigation for obstruction of justice. That's a very
19 serious thing. I don't have the grand jury minutes, so I don't
20 know what was there.

21 THE COURT: Let me ask a slightly different
22 question --

23 MR. ALONSO: Yeah.

24 THE COURT: -- because I'm intrigued by your making
25 money argument. If you purchase business opportunities for a

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1 thousand dollars, that's how much money you put in, and it
2 yields \$20, have you made money?

3 MR. ALONSO: Yes. Now, you have not made profit, but
4 you have made money. And if it's ambiguous to you and me
5 having this conversation here, what was it to the grand jury or
6 to the magistrate judges who heard that from the agent? I mean
7 "no one makes money" can mean different things. Now, that
8 person made money.

9 And I would also submit that that person may have been
10 perfectly happy with the services. That may not be a fraud at
11 all. Right? That person bought services, paid for services,
12 and got \$20 out of it. We don't know if they lost interest. I
13 mean, this --

14 THE COURT: I purchased a business opportunity for a
15 thousand dollars. At some point I receive \$20 back. I am so
16 happy. Is that your argument?

17 MR. ALONSO: No, your Honor. My argument is that this
18 is not as simple as the government has painted it. I
19 recognize --

20 THE COURT: That may be.

21 MR. ALONSO: I recognize that this is --

22 THE COURT: That may be. You may have statements of,
23 you know, we don't promise any specific rate of return, and you
24 may have people on sales floors saying something very
25 different. So it's not as simple as it appears.

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1 MR. ALONSO: Right.

2 THE COURT: That's true. But you have presumption of
3 regularity. We don't -- you just are saying -- you have made
4 arguments on behalf of the government. The court system,
5 through Rule 6(e), is highly protective of grand jury
6 proceedings, and I assume at some point in your career, given
7 what you said this morning, you in fact argued them.

8 MR. ALONSO: Absolutely. Of course. But right
9 now --

10 THE COURT: And you want me here, if I understand -- I
11 don't think this is one of your best arguments. You can tell
12 my view. You want me here to permit disclosure of grand jury
13 minutes to breach grand jury secrecy on the theory that
14 somebody is just hunky-dory because they made \$20 on a
15 thousand-dollar investment.

16 MR. ALONSO: Well, first of all, that's a hypothetical
17 that your Honor put forward --

18 THE COURT: Yes.

19 MR. ALONSO: -- but --

20 THE COURT: Yes.

21 MR. ALONSO: -- I will say that what I am asking for
22 right now is for your Honor to look at it. I'm not asking
23 right now for you to give it to us immediately. But what I'm
24 saying is, if it's true that they made these misleading
25 statements before the grand jury, it's not just about the

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1 making money. Right? I submitted a testimonial from a
2 customer on my reply brief --

3 THE COURT: No, I saw that.

4 MR. ALONSO: -- who made \$55,000.

5 THE COURT: I saw that.

6 MR. ALONSO: Yeah, so the question is, right, if they
7 are saying no one --

8 THE COURT: I won't ask if you have interviewed that
9 person. The name was blacked out on my copy. Go ahead.

10 MR. ALONSO: Right. The -- by the way, that
11 testimonial was among 3600 pages of things the government gave
12 us. A lot of them do have these low amounts.

13 But again, we all understand how this works. Right?
14 If you are being sold something that is coaching for your
15 business, you have to actually work on it. Right? The fact
16 that somebody didn't make money doesn't mean that they would
17 say, help, help, I have been defrauded. They might have lost
18 interest. They might have not done the work. Right? I mean,
19 if you are getting web services or coaching services, whatever,
20 even if it was substandard stuff, right, they still have to go
21 out and do it and sell. Right? And no one is blaming the
22 victims here. I am just saying that the fact that somebody
23 made \$20 on a thousand-dollar investment is certainly no
24 evidence, without much more, that that's fraud. But the agents
25 kept saying no one made money, no one made money, no one made

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1 money. We have put forward evidence that people did make
2 money. So all I am asking is for you to read the minutes, and
3 if they show what I think they show, then at that point we
4 would like to make motions on it.

5 THE COURT: All right. What else?

6 MR. ALONSO: All right. So on the *Giglio* motion, this
7 is the enforcement of the Rule 5(f) order that your Honor
8 entered in late May, we are seeking simply for you to enforce
9 it. The government has declined to obey your Honor's order.
10 They didn't object when we moved for it. They are now saying,
11 I think --

12 THE COURT: Are you talking about the disclosure of
13 3500 material?

14 MR. ALONSO: Not 3500. Your Honor ordered that both
15 impeachment and exculpatory material be identified --

16 THE COURT: Right.

17 MR. ALONSO: -- promptly upon its being discovered.
18 Obviously we would be reasonable about this. We are not
19 looking for every little thing. They don't know exactly what's
20 inconsistent with their witnesses. But they know lots of it.
21 Right? They know who the cooperators are. They know what the
22 impeachment material is that they have now.

23 THE COURT: You are asking that the impeachment
24 material be turned over immediately.

25 MR. ALONSO: I suppose --

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1 THE COURT: Identified.

2 MR. ALONSO: Promptly upon it's being identified,
3 which is what your Honor ordered.

4 THE COURT: Okay.

5 MR. ALONSO: So I don't honestly understand --

6 THE COURT: Fair enough.

7 MR. ALONSO: -- their argument here.

8 And I will call your Honor's attention to our reply
9 brief, where I point out how they have also misrepresented
10 your Honor's order. They said that your Honor's order makes
11 clear the *Giglio* material need not be produced immediately upon
12 its identification, when you said the opposite. They said that
13 the *Giglio* order does not expressly address the defendant who
14 appears intent on proceeding to trial when your order said the
15 opposite. So all we ask for is enforcement of that order.
16 And, again, we will be reasonable. We are not saying give us
17 everything right now indexed. We will talk about it.

18 THE COURT: Well, October is coming up fast.

19 MR. ALONSO: Assuming that's the real date, but we
20 are --

21 THE COURT: Why not? I haven't heard anything
22 otherwise.

23 MR. ALONSO: Well, we just had an informal discussion
24 beforehand, and I'm sure we will talk about it more, as to
25 whether the Court can try three defendants. That's all.

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1 THE COURT: I have an October date here for this
2 trial.

3 MR. ALONSO: And we would like to go to trial in
4 October, just to be clear, your Honor.

5 THE COURT: All right.

6 MR. ALONSO: And finally, finally, we have the
7 question of the suppression motion. We urge the Court to order
8 a suppression hearing. All right? We do have --

9 THE COURT: I do want to hear from the government why
10 that doesn't make sense. It seems to me it is worthwhile
11 having the hearing, so I have a better sense of what's
12 happened.

13 MR. ALONSO: Thank you, your Honor. The basic point
14 is that we have submitted sufficient sworn allegations here,
15 and the government has submitted nothing but unsworn
16 statements and arguments in their legal argument. So I don't
17 know why they didn't submit an affidavit from
18 Detective Bastos --

19 THE COURT: Well, they don't have to do that. I saw
20 you are trying to get them on the record. They don't have to
21 do that. They can have him testify at the hearing.

22 MR. ALONSO: Well, that would be fine with us, your
23 Honor.

24 THE COURT: All right.

25 MR. ALONSO: So in sum, boxing with ghosts. We urge

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1 you to dismiss the indictment. But if you don't do that, we
2 really do need a lot more information if we have any chance to
3 actually approach these charges.

4 THE COURT: All right. I think that's a fair way to
5 summarize your argument. Okay.

6 MR. ALONSO: Thank you, your Honor.

7 THE COURT: Government. Who is the boxer?

8 MR. SOBELMAN: Your Honor, I have the honor of
9 addressing your Honor.

10 THE COURT: Go ahead.

11 MR. SOBELMAN: Your Honor, would you like me to go in
12 any particular order or should I address them in the way the
13 defense counsel addressed them?

14 THE COURT: That probably makes the most sense.

15 MR. SOBELMAN: Okay. Starting with the defendant's
16 motion to dismiss, his argument entirely ignored the *Klein*
17 case, which was decided by the Second Circuit in 2007. It
18 found "no error" in a bank fraud indictment that did not
19 "explicitly use the word 'material' because materiality can be
20 inferred to be an element of criminal fraud because of the well
21 understood meaning of fraud as a legal term."

22 That holding is directly applicable here. There is no
23 way to distinguish it. Defense counsel says, well, that's
24 plain error review. But the circuit found no error, not no
25 plain error. No error. And every other circuit to have

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1 addressed this issue, and we cited cases in our brief, have
2 come out the same way, as have all the district courts that we
3 were able to find that have rendered decisions on this in this
4 district.

5 The idea that you have to use the magic word
6 "material" in an indictment has no support in the case law.
7 The court doesn't have to engage in the sort of like trying to
8 read a specific facts --

9 THE COURT: Your argument is the "material" can be
10 inferred. Is that what your argument is?

11 MR. SOBELMAN: It can be inferred in two ways. One,
12 just based on the charge itself, under the *Klein* case. Two,
13 there is a series of cases, including some in this circuit and
14 courts of appeals, that say that where the word "fraud" or
15 "defrauded" or the allegations involve fraud, it can be
16 inferred.

17 And then there is yet a third set of cases, in case
18 the first two weren't persuasive -- and the first is binding --
19 in case the first two aren't persuasive that say that the facts
20 in an indictment, taken in favor of the government, can be read
21 to infer materiality.

22 So there is really no need to parse the indictment the
23 way that defense counsel wants the Court to. I am happy to go
24 through the indictment in that kind of detail, but unless the
25 Court finds that for some reason *Klein* does not apply, I don't

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1 see how this argument can possibly be meritorious.

2 THE COURT: Go ahead.

3 MR. SOBELMAN: I want to make just one other note,
4 which is, defense counsel keeps trying to put this case in a
5 particular box that is an outdated notion of a quote/unquote
6 false promise case and wants to cast it as some kind of breach
7 of contract. Obviously that's not what we have here. The
8 false promise line of cases was from before the 1343 was
9 amended to include pretenses and representations. We have
10 all three in this case. This is not merely something was
11 promised in a contract and something else was given. As your
12 Honor knows and I think acknowledged, it's a much more
13 complicated set of facts than that, and we don't think it is
14 appropriate to put it in that box, and therefore those cases
15 would not apply.

16 I just want to make two other notes, and then I will
17 move on to the next motion, unless your Honor has questions.
18 One is, defense counsel keeps saying an intent to harm is an
19 element. It is not. As your Honor instructed in the *Ketabchi*
20 case, an intent to defraud is an element of the underlying
21 object.

22 Which leads me to my final point, which is, this is a
23 conspiracy case. It is about an agreement. It is not about
24 specific -- and we will have evidence of this at trial, but it
25 is not about a specific transaction. And defense counsel keeps

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1 trying to use case law that has applied in sort of isolated
2 incident cases -- and this is the same as the bill of
3 particulars which I will get to in a moment -- to try to import
4 that case law into this circumstance where the case law has
5 been very clear it does not apply.

6 Just very briefly, *Shellef*, the 2007 Second Circuit
7 case, has no application here. Defense counsel referenced it
8 in his argument in his reply brief. Your Honor, that case
9 actually supports our argument. It makes a distinction
10 between cases where -- it's really sort of in the puffery
11 jurisprudence cases, where there is sort of an incidental
12 comment or lie told that's not really the basis of a bargain in
13 a purchase or sale fraud. Here, as your Honor knows from the
14 *Ketabchi* case and from the indictment, the representations that
15 were made in the course of the conspiracy were critical and
16 central to the purchase or sale of these business and --
17 business services and products, and we have alleged, and intend
18 to prove, that without those the transactions almost certainly
19 would not have occurred, which, again, is materiality, but it's
20 simply not using the magic word in the indictment.

21 I also just want to note, as factual matter, defense
22 counsel keeps characterizing his client as someone who
23 brokered leads. That certainly is an important part of her
24 conduct, and one that we layed out in our five-page detailed
25 summary of her conduct in our opposition, but she also ran a

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1 BizOp floor in New York City that was directly selling to
2 customers. This is not someone who is sort of aloof from what
3 was going on on the ground. She was running the ground troops.
4 So the suggestion that we are not going to prove that at trial
5 is going to be false.

6 Anything else on the motion to dismiss, your Honor,
7 before I turn to the bill of particulars?

8 THE COURT: Go ahead.

9 MR. SOBELMAN: With respect to the bill of
10 particulars, we have the same problem, where defense counsel
11 wants to use cases related to isolated incident crimes and try
12 to import them into sort of a continuing scheme or a
13 long-running conspiracy crime that we have here. So *Bortnovsky*
14 involved a set of a few isolated fraudulent incidents that was
15 within a much larger set of transactions, and the government
16 didn't adequately identify the handful, literal handful of
17 fraudulent incidents that were at issue.

18 Now, cases like *Tuzman*, which is an SDNY case, have
19 explained that, for a bill of particulars, there are two types
20 of cases to apply the principles. One is what I would call
21 isolated incidents or handful of incident cases, like
22 *Bortnovsky*; and then there is another category, which we are
23 very much in, which is long-running scheme where, as *Tuzman*
24 puts it, all or most of the conduct is alleged to be unlawful.
25 That's where we are, all or most.

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1 The BizOp floors that the defendant run -- ran, all or
2 most of that conduct, in our view, was unlawful. The leads
3 that she was brokering, all or most of that conduct, in our
4 view, was unlawful. That's what the allegation is. It's clear
5 in the indictment. It's clear in our motion papers. It's
6 clear to defense counsel. There is no hiding the ball here.
7 We are not going to put on a trial where we say there were
8 three victims that were defrauded over the course of several
9 years. We may not have a hundred victims testify at trial --
10 it will probably be more on the order of what testified at the
11 *Ketabchi* trial -- but certainly there will be ample testimony
12 and documentary evidence and communications showing this was a
13 comprehensive, long-running scheme, and not something where
14 there is a handful of isolated incidents.

15 So where does that leave us? It leaves us in the bill
16 of particulars context with a whole series of cases that we
17 cite in our brief, like *Cuti*, *Guttenberg*, where the Courts say,
18 for these types of cases, a bill of particulars asking for the
19 things that the defendant wants are not appropriate.
20 *Bonaventure*, which is a Judge Swain decision from 2013. They
21 have cited no case, and the government is not aware of one
22 where the Court has required the type of disclosures that they
23 are requesting in a case like this. It is just not in that
24 category.

25 THE COURT: No, but what about -- step back. You have

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1 got a minimum of a million documents here. They are swimming
2 in documents. It's no longer 4,000, to use Mr. Alonso's point.
3 They say they have no idea what they ought to be looking at.
4 How are you assisting them in that?

5 MR. SOBELMAN: Your Honor, we have been readily
6 available to them. We have had phone conversations. We have
7 had videoconferences. We have written letters, that I will
8 talk about in a second, that were attached to the defendant's
9 motion, including one -- you know, one of the things he asked
10 for today was the things he wants are coconspirators, victims,
11 sales floors. One thing he couldn't remember. I don't know
12 what the thing he couldn't remember is, but coconspirators,
13 victims, sales floors, we gave them a list, a while ago now, of
14 41 --

15 THE COURT: Well, you haven't listed all the
16 coconspirators.

17 MR. ALONSO: We haven't -- I'm not sure that's true,
18 but we haven't committed to a final, binding list. The bill of
19 particulars asked here, your Honor, does not have a legal basis
20 and it is purely strategic. We gave them a list in good faith,
21 as comprehensive as we could make it, of 41 individuals and
22 entities that are sales floors, fulfillment floors, and
23 coconspirators, and other people who may not be coconspirators
24 but were involved in the operations that the defendant was
25 involved in, to try to help them narrow their focus.

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1 But every time we answer a question from defense
2 counsel, there is ten more follow-up questions. And we answer
3 as many as we can, but they always want more. It is never
4 enough. And that is not how the bill of particulars law works.

5 What we have given is enough. It's more than enough.
6 And the volume of discovery does not call for a bill of
7 particulars here. First of all, they have shown that they are
8 quite deft at navigating the discovery. They have a
9 coordinating discovery attorney who has a comprehensive
10 database for them, called Casepoint, that all their materials
11 get put into and is searchable by them. We actually don't have
12 something like that. When they put in a document and said, oh,
13 the government had this before the search warrant, we were able
14 to look at the Bates number and tell that particular version we
15 did not have because it was on our production log which they
16 also have and showing when we produced it to them, which is
17 usually very shortly after we receive it.

18 They were then able to go back apparently and query
19 and find other versions of the same document that we had
20 produced in earlier productions. We actually don't even have
21 the ability to do those kind of queries across all of our
22 documents. So I don't know the inner workings of how they are
23 dealing with the discovery; but, frankly, if anything, they
24 are in equipoise with us, but what they have suggested so far
25 makes me think they are actually much further ahead of where we

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1 are.

2 And in any event, so although I understand the Court
3 wants to have a trial in October, we want to have a trial in
4 October, defense wants to have a trial in October, the remedy
5 for "we have a lot of materials to get through" is not to bind
6 the government to a bill of particulars to give essentially an
7 early witness list and an early exhibit list. It's to give the
8 defense more time. If their assertion is, you know, from March
9 to October is not enough time, given the volume of materials,
10 the government would have no objection to them having
11 additional time. It would be a perfectly reasonable ask.

12 But instead, they don't ask for that. They say we
13 want a trial soon and we want to bind the government and put a
14 strategic limitation on them, even though we know their
15 investigation is ongoing. Your Honor, we are meeting with
16 witnesses in the case every single week, and they know from
17 discovery we are continuing to obtain new materials. It is
18 simply not called for here.

19 Unless your Honor has any other questions about the
20 bill of particulars, I can move on to the *Brady* motion.

21 THE COURT: Go ahead.

22 MR. SOBELMAN: Your Honor is absolutely correct that
23 we have no duty to identify specific materials and I really
24 don't think the defense or the Court really wants that to be
25 our job. We are not an adjunct of the defense.

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1 Every Court of Appeals, about half of them have
2 considered a request like this, and I can give the citations to
3 your Honor. We cited the most recent one, which is the Fourth
4 Circuit, the Yi case, in our brief, but there are another five
5 circuits or so that have considered this, and they have all
6 rejected it.

7 It is not the duty of the government to try to figure
8 out, document by document or communication by communication,
9 what is potentially useful to the defense. Our obligation is
10 to produce the materials that might be potentially useful to
11 them, not to go through and provide them a road map. I'm not
12 even sure if anyone wants us making those judgments, because we
13 could be wrong, which is why we take an "abundance of caution"
14 approach. We produce virtually everything that's provided to
15 us from third parties and that we obtain.

16 The only things that haven't been produced at this
17 point are some, but not all, witness statements. As defense
18 counsel acknowledged, we have provided witness statements
19 and -- usually in letter form disclosing specific statements
20 that are made that we view as potentially useful or helpful to
21 the defense. We take these obligations really seriously.
22 There is no need and really no showing that would require the
23 Court going back -- requiring us to go back and do additional
24 work.

25 That being said, we are continually reviewing and

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1 re-reviewing the small subset of items we have not produced to
2 make sure we can't come up with some theory that is useful to
3 the defense. And at certain points when we are reviewing, we
4 find things and we say, you know what, in light of what they
5 have said and the way the case is going, this actually might
6 fall into that category, and we are constantly taking the
7 "abundance of caution" approach.

8 In any event, we have proposed a mutual pretrial
9 disclosure schedule to the defense. We proposed it a month
10 ago.

11 THE COURT: I don't think I have seen that, is that
12 right?

13 MR. SOBELMAN: No, your Honor. It is between the
14 parties. We told defense, look, let's try to agree on 3500 and
15 *Giglio* deadlines and other things sort of keyed off of your
16 Honor's motions *in limine* deadline, expert disclosures, things
17 like that. We haven't heard back substantively. They said
18 they got it and they would get back to us. We haven't heard
19 back. We are eager to make sure that they are comfortable with
20 the amount of time that we are going to give them for 3500 and
21 *Giglio* material. We don't want to have a trial by surprise.
22 We want to make sure that, in case there were a statement in
23 some document that we didn't view as potentially favorable to
24 them, but they want to follow up on, they have the time to do
25 that.

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1 We are not going to give 3500 the Friday before trial
2 like in *Gil*. I think our proposal is much longer than that. I
3 don't know exactly where we will land after they hopefully
4 respond to us, but we don't anticipate it being last minute.
5 As your Honor may remember in *Ketabchi*, I believe we produced
6 3500 about two weeks out from what ended up being the trial
7 date. That seemed to work very well. We may land on a date
8 even further out here or closer, depending on how the
9 discussions go.

10 And your Honor, I will just note we, as a courtesy, in
11 response to their request, produced all of the 3500 from the
12 *Ketabchi* case already --

13 THE COURT: Yes, I saw that.

14 MR. SOBELMAN: -- all the exhibits. So -- and some of
15 the witnesses may overlap. So they have the *Giglio* for those
16 particular witnesses who we may call in this case. So they are
17 actually at a much more significant advantage than the *Ketabchi*
18 defendants were. And as your Honor saw in that case, defense
19 counsel had no problem putting on a vigorous and able defense.

20 THE COURT: Well, Mr. Alonso is saying that case has
21 nothing to do with this case.

22 MR. SOBELMAN: We think he is wrong and that your
23 Honor will see that at the trial. And we think it is evident
24 from our briefing and the indictment that that's simply not
25 true.

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1 Was Ms. Shah a defendant in that case? Of course not.
2 But it's the same theory. It's the same group of actors. We
3 expect some of the witnesses may overlap. I think it will be
4 strikingly similar, that these two defendants' roles were
5 slightly different than the roles of the two defendants who
6 went to trial in *Ketabchi*. They are much higher up on the
7 chain.

8 THE COURT: Who is much higher up on the chain?

9 MR. SOBELMAN: Ms. Shah and Mr. Brewster. I am
10 referring to the defendants represented here today. And
11 Mr. Allen. All three defendants we expect to go to trial are
12 much higher up on the chain than Mr. Owimrin, O-W-I-M-R-I-N, or
13 Mr. Shahram, S-H-A-H-R-A-M, or *Ketabchi* were.

14 THE COURT: You misspelled Shahram.

15 MR. SOBELMAN: Sorry. I'm doing it on the fly.

16 THE COURT: S-H-A-R-A-M.

17 MR. SOBELMAN: Ms. Fletcher thinks the Court is wrong,
18 but --

19 THE COURT: That may be, but she will keep that to
20 herself. Go ahead.

21 MR. SOBELMAN: She tried to.

22 THE COURT: We will make sure the spelling is correct.
23 I don't mean to be flip. We will make sure the spelling is
24 correct. Proceed.

25 MR. SOBELMAN: In any event, your Honor, one other

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1 point, which is, the suggestion that people agents may have not
2 decided to -- have not interviewed, like disclose --

3 THE COURT: What about the -- Mr. Alonso's point about
4 the 5(f) statement that requires promptly turning over *Giglio*
5 material.

6 MR. SOBELMAN: Your Honor, I think that order, at
7 best, is ambiguous. We read it the way we explained, which is
8 that, because of the modifier that says, for example, before a
9 plea there is no need for *Giglio* material to be produced, that
10 would be inconsistent with a reading that as soon as *Giglio*
11 material is identified it be produced.

12 But in any event, it is kind of an odd order if that
13 is what it was meant to say, and we would ask that, to the
14 extent the Court reads it that way, it be modified. We don't
15 know what witnesses we are going to call at trial. We have
16 some idea of who we may or may not call. But to produce *Giglio*
17 material three months out from trial, one, it's inconsistent
18 with practice in this district; two, it's completely
19 unnecessary; and, three, we are not sure exactly what that
20 would mean. So if that's what your Honor intended, we will do
21 our best to comply with it, but we don't think that's what the
22 Court --

23 THE COURT: As you phrase it, material three months
24 out doesn't make sense. You are right about that. Although I
25 will hear from Mr. Alonso on that.

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1 MR. SOBELMAN: So, your Honor, we would propose, as
2 we have to defense counsel, that we try to reach agreement on
3 when 3500 and *Giglio* material be produced together and that
4 it be done in the same way it is done in virtually every case
5 in this district and seems to work quite well. There is
6 nothing about this case that makes it different or special in
7 that way.

8 THE COURT: Suppression.

9 MR. SOBELMAN: Yes, your Honor. I have a lot of
10 paper here, if your Honor will give me a second to get control
11 of it.

12 THE COURT: Of course.

13 MR. SOBELMAN: Your Honor, the key point with respect
14 to whether a hearing is appropriate is that the defendant's
15 state of mind does not become relevant unless and until the
16 defense makes a showing that there was some mental or physical
17 coercion by the police. And the case --

18 THE COURT: That argument is a bit sideways, but
19 that's really what the argument is. The argument is because
20 Mr. Alonso's papers focus on the word "just" from Bastos, that
21 is, she was being coerced into responding because he said "we
22 just want to talk to you." I happen to think that's freighting
23 that word with too much significance, but it would be helpful
24 to get a better sense of it if I hear the people.

25 MR. SOBELMAN: Your Honor, I take your point, but even

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1 if -- you know, it's not about the agents' intent. It is about
2 what happened. So the fact --

3 THE COURT: No. They are arguing that the word
4 "just" --

5 MR. SOBELMAN: I understand.

6 THE COURT: -- was misleading and coercive in a way.

7 MR. SOBELMAN: Your Honor, but I think in light of the
8 rest of the facts, so the fact that before she -- before
9 Detective Bastos supposedly said that, he told -- he and the
10 other agents told the defendant -- and this is crediting her
11 version of the fact -- that she was under arrest, she was
12 placed in handcuffs, they then again, during the interrogation,
13 remind her that she is under arrest. She is handcuffed the
14 entire time. It's incredibly clear to any person what is going
15 on. And there is no case where a Court has ordered a hearing
16 or suppressed statements off of something so benign.

17 And even crediting the defendant's statements in her
18 declaration, in light of the waiver -- and I'm not sure if your
19 Honor has listened to the audio of the interview, but it is
20 crystal clear that she is not being coerced -- in light of the
21 tone, the demeanor, the way in which they carefully go through
22 each of the items in the *Miranda* waiver; and the government's
23 view -- and I don't think this is a close call -- is that even
24 crediting that he said at some point, you know, look, trying to
25 calm her, it seems, you know, Ms. Shah, we just want to talk to

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1 you, we just want to make sure you are okay, that is in no way
2 misleading.

3 This case is very much like *Colorado v. Spring*, where
4 the allegation was, well, the defendants misled them by not --
5 sorry, the agents misled the defendant by not saying, at the
6 outset of the conversation, this is what you are charged with,
7 and that is the same thing that happened here. There is
8 nothing that the agents would say at a hearing that would
9 modify what the word "just" meant, if we are crediting, for the
10 purposes of the Court being able to dispose of this motion,
11 that Detective Bastos said that.

12 But even if you credit that, it's just simply not
13 misleading under the cases that apply to situations like this.
14 So you don't get to the defendant's state of mind, because
15 there simply is no coercion. I suppose if your Honor thought
16 that saying some calming words like that was potentially
17 coercive, I mean, rose to the level of police coercion, a
18 hearing would be appropriate. But it just simply isn't as a
19 matter of law. It is not -- there is no factual dispute. We
20 are crediting everything the defendant has said in her
21 declaration for the purposes of this motion. But under the
22 prevailing and applicable and controlling law, it just doesn't
23 get defendant where she is trying to go.

24 THE COURT: All right. I understand your point.

25 I think that does it. Is there anything else?

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1 MR. SOBELMAN: Let's see, your Honor.

2 In light of your Honor's reaction with respect to the
3 grand jury minutes argument, I am happy to not address it, but
4 if your Honor would like me to, I will.

5 THE COURT: Briefly, go ahead.

6 MR. SOBELMAN: Okay, your Honor. The --

7 THE COURT: I do think you have, by far, the better
8 part of the argument, but let me hear it.

9 MR. SOBELMAN: We strongly agree. The quibbling about
10 the definition of "operate" I think is emblematic of the
11 defendant's argument here. We have one dictionary that has one
12 definition. They say, no, please adopt a different definition.
13 Just as in the *Franks* territory, this would make it entirely
14 outside of what *Franks* would cover. If a word -- if we are
15 arguing over the definition of a word, it by definition could
16 not have been, you know, intentionally misleading to the point
17 where the suppression of a motion -- suppression of a search
18 warrant or the inspection of grand jury minutes could possibly
19 be warranted.

20 And most of what Mr. Alonso's argument on the grand
21 jury minutes was, was his defense or his client's defense,
22 which is, we think the defense will put on a trial, and we are
23 prepared to engage with that defense, which is, well, there are
24 other facts from other people at other times that might cast
25 doubt on the government's theory.

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1 And the thing he relied most on was the testimonial,
2 which of course the government didn't have at the time of the
3 grand jury presentation, and Mr. Alonso well knows that. We
4 just got it recently and promptly produced it to him.

5 But at the end of the day, his disagreement with you
6 know, what "made money" might mean or what "operate" means
7 takes this well out of the types of circumstances where an
8 inspection of the grand jury minutes might be appropriate.

9 THE COURT: You are right on that.

10 MR. SOBELMAN: Your Honor, I think that's all the
11 motions. I'm obviously happy to answer any questions the Court
12 may have.

13 THE COURT: Thank you.

14 Mr. Alonso, did you want to briefly reply?

15 MR. ALONSO: Briefly, your Honor, just on a couple of
16 things.

17 It sounds like the government agrees that we are going
18 to trial, which means that the *Giglio* order is operative now.
19 Right? I mean, the statement that they are not required to
20 produce *Giglio* before a guilty plea is an unremarkable
21 recitation of Supreme Court law. So, we are going to trial, so
22 we do urge the Court to hold them to that. And, again, yeah,
23 if they don't know they are going to call somebody, we are not
24 unreasonable here. We really -- we understand. But there is
25 *Giglio* material they know about today that we should have.

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1 I remembered the fifth piece, by the way, which I
2 think is pretty important here on what we are asking for for
3 the bill of particulars. There were seven in my opening
4 papers, five in the reply. The fifth is the nature of the
5 business services that they are claiming that Ms. Shah was
6 responsible for selling or foisting on the so-called
7 unsuspecting purchasers.

8 The reason that's important is because the
9 indictment -- the superseding indictment only mentions web
10 services, tax preparation services, and coaching, and generally
11 business services. But if we are supposed to use *Ketabchi* as a
12 road map, I read their summation in *Ketabchi*, and we have got
13 corporate credit, Youngevity, merchant terminal, tax prep,
14 coaching services, corporate LLC, front-end web services,
15 merchant account set-up services. You get the point. The idea
16 is, we should at least know what theory we are supposed to be
17 defending against. What is it they are saying that her
18 conspiracy was selling to these purchasers? So that was the
19 fifth piece, your Honor.

20 So on *Bortnovsky*, you know, I don't see how you
21 distinguish that case in the picky way that the government
22 suggested. There, there was a series of burglaries and only
23 some of them were operative. Here I think I heard Mr. Swett
24 say that all or most --

25 THE COURT: Mr. Sobelman.

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1 MR. ALONSO: I'm sorry. Mr. Sobelman. My apologies.

2 THE COURT: Mr. Swett --

3 MR. ALONSO: I think I heard him say -- I'm sorry,
4 Judge?

5 THE COURT: Mr. Swett has not said anything today.

6 MR. ALONSO: My apologies.

7 I think I heard Mr. Sobelman say that all or most of
8 the conduct alleged here is unlawful. Well, I think we need to
9 know whether it is all or most, and if it is most, which is it?
10 Well, because --

11 THE COURT: Why is that?

12 MR. ALONSO: Because, Judge, if you saw --

13 THE COURT: Whoa, whoa. Why is that?

14 MR. ALONSO: Because if you saw the millions of pages
15 that we have to look at, what is -- what does it mean to defend
16 against this case? We could easily be trying two different
17 cases. There could easily be ten conspiracies lurking within
18 these papers. So if they are saying everything is -- so
19 everything now is unlawful. "Unlawful" is the wrong word since
20 we have an entire FTC regime here. But everything is criminal
21 I understood him to be saying. Then, okay, so are we then
22 allowed to -- what happens if we prove that 100 of the
23 purchasers were perfectly satisfied or that Ms. Shah had
24 nothing to do with certain leads? I just don't know what I am
25 supposed to -- like I said, boxing with ghosts. What am I

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1 supposed to defend against? That's the idea here. So if it is
2 literally everything, I can't imagine it's literally
3 everything, and I will add, and this goes to the point where --

4 THE COURT: I think that was their argument in
5 *Ketabchi*.

6 MR. ALONSO: Perhaps, and it's also what they said in
7 response to Brewster's motion. But that's not what they said
8 in response to Ms. Shah's motion either in writing or here
9 orally.

10 So -- just give me one second, please.

11 Intent to harm, Judge, that's Second Circuit case law.
12 Right? That's the *D'Amato* case, where a mail fraud conviction
13 was versed. Intent to harm comes from *D'Amato*. The Second
14 Circuit considered *en banc* in *Rybicki*, which I also argued for
15 the United States, and Judge Raggi, in her concurrence, was
16 clear that that is what it requires.

17 So intent to harm is a different way to say intent to
18 defraud. I'm not saying it is a new standard. It's a
19 different way to say intent to defraud.

20 On materiality, I -- honestly I don't -- I don't
21 understand their argument that *Klein* controls here, Judge, for
22 a couple of reasons. It was based on plain error, so the only
23 holding there is that it was not plain error, you know, for the
24 district court to do what it had done. The statement "no
25 error" is clearly *dicta*, because it was an unpreserved

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1 argument that was raised for the first time on appeal. And as
2 I pointed out, because it was plain error, it is a very short
3 discussion.

4 This case presents a great opportunity for your Honor
5 to really look at this issue. There is lots of case law that
6 the Second Circuit in *Klein* did not address about having to --
7 about having to literally state *in haec verba* the implied
8 elements of particular crimes. That is *Pirro*, that's other
9 cases, and the Second Circuit didn't even cover it. The Second
10 Circuit seemed to say in that case, on plain error review, that
11 of course materiality is part of fraud because that's just --
12 fraud is materiality. And again, if that were the case, we
13 would have never needed the *Neder* case. Right? *Neder* wouldn't
14 have been necessary in the first place. The question presented
15 to the Supreme Court there is, is materiality an element of
16 mail fraud, wire fraud, or bank fraud.

17 On the *Miranda* question, I think your Honor is --
18 based on your questions, I think you are hopefully leaning
19 towards a suppression hearing.

20 THE COURT: Yes, but I actually try to listen intently
21 to counsel --

22 MR. ALONSO: No, no.

23 THE COURT: -- and what Mr. Sobelman's argument was,
24 an hour and 20 minute long tape combined with your client's
25 affidavit showed that there is no issue but that there was no

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1 coercion or misleading.

2 MR. ALONSO: The citation to the recording would be an
3 excellent argument if we were arguing that the statement was
4 coerced. That's not what we are arguing. We are arguing that
5 the *Miranda* waiver was coerced. Right? It's a different
6 argument. The statement itself flowed from the *Miranda* waiver,
7 and everything we know about the statement comes from
8 Ms. Shah's declaration. So the fact is that the --

9 THE COURT: But then that goes back to what I was
10 saying, that you are putting 100 percent, 90 percent of your
11 reliance on the word "just."

12 MR. ALONSO: No, your Honor. Mr. Sobelman
13 specifically said that nothing the agent said was misleading.
14 They specifically wrote in their complaint that the agent
15 didn't say anything that was incorrect in response to her
16 questions. What they wrote is exactly the opposite of what is
17 in Ms. Shah's affidavit. She is asking questions, and she is
18 asking lots of questions because -- she is asking, Am I under
19 arrest? What is this about? Am I going to jail? To her --
20 she is less sophisticated, she is not a lawyer, she is not an
21 agent -- "am I under arrest/am I going to jail" are the same
22 thing. She is asking those questions. Right? Clearly he was
23 trying to mislead her, because what he wants is to get her
24 sitting down and answering questions. And she wants --

25 THE COURT: I'm sorry. Go ahead. She wants?

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1 MR. ALONSO: She wants to know what's going on, and he
2 is simply lying to her, saying that he wants to make sure she
3 is okay. Remember it's not just -- it's not just "just." It
4 is also "just want to make sure you are okay." Remember that
5 she is the beneficiary of an order of protection from a
6 New York judge, and this is a New York Police Department
7 detective saying he wants to make sure she is okay. This cries
8 out for a hearing your Honor. What she is saying uncontested,
9 unrebutted --

10 THE COURT: She never even mentioned she disavows
11 knowing the guy. It's apparently it is not as if she is really
12 concerned about the --

13 MR. ALONSO: Well --

14 THE COURT: -- person who is mentioned in the order.

15 MR. ALONSO: All we have is her sworn statement
16 that --

17 THE COURT: And in fact, according to the government,
18 it is the very end of the interview.

19 MR. ALONSO: So this man had a temporary order of
20 protection against him. He traveled to Utah, beat her up, was
21 convicted -- very rare in New York County -- convicted of
22 felony criminal contempt, and there is a five-year order of
23 protection in her favor that expires in 2026.

24 THE COURT: No, but the government's point is if it
25 really were bothering her, she certainly would have said that

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1 during the interview.

2 MR. ALONSO: Perhaps, your Honor, but when we are
3 talking about these kind of situations, you know, women don't
4 necessarily always jump up, particularly when they are
5 handcuffed to a chair. This is not a friendly conversation,
6 right? Listen, as I signaled to your Honor --

7 THE COURT: We don't have to argue it now, I don't
8 think, but that cuts against your argument if particularly she
9 is handcuffed to a chair, then she certainly knew it was not
10 just a discussion.

11 MR. ALONSO: She is unsophisticated, your Honor.
12 This is not somebody -- whatever mastermind they want to say
13 she is, she is not. She is not a sophisticated person. All
14 she wanted to know -- she didn't know if her husband was okay.
15 She did know if the New York Police Department detective had
16 something to do with this horrible person who beat her up,
17 who -- if you saw --

18 THE COURT: All right. I understand the argument.
19 Let me think about that hearing point.

20 MR. ALONSO: All right.

21 THE COURT: I want to get into Mr. Poscablo.

22 MR. ALONSO: The only last piece I will refer to is
23 on the discovery piece. I don't know -- I'm not going to say
24 it's a disingenuous point, but the idea that they don't have
25 access to the third-party database strikes me as odd, as I

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1 assume --

2 THE COURT: They don't have access to Casepoint. It's
3 paid for by the defendant.

4 MR. ALONSO: Okay. But it's not hard to get those
5 kind of databases. They are ubiquitous in this world. To have
6 a relatively --

7 THE COURT: That I can't say. That I don't know. I
8 have the representation of Mr. Sobelman. That's all I can go
9 on.

10 MR. ALONSO: But it might be a good argument if they
11 were an ordinary litigant receiving discovery, but they have
12 been investigating this case for five years. These documents
13 came in bit by bit. Presumably the agents looked at them when
14 they came in --

15 THE COURT: That doesn't mean they have a manipulable
16 database.

17 MR. ALONSO: Right, but --

18 THE COURT: I don't know whether they do or not. I
19 have Mr. Sobelman's statement.

20 MR. ALONSO: But they don't have to have a manipulable
21 database. They have to question the agents to find out what is
22 out there that's favorable to the defense.

23 THE COURT: Okay.

24 MR. ALONSO: Thank you.

25 THE COURT: All right.

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1 MR. SOBELMAN: Your Honor, before we turn to
2 Mr. Brewster, may I respond on the hearing issue?

3 THE COURT: Yes.

4 MR. SOBELMAN: Your Honor, just three very brief
5 points.

6 First of all, the defendant was told, even under her
7 version of the facts, that she was under arrest. They had an
8 arrest warrant for her and placed her in handcuffs. There was
9 no even arguable misleading about what was going on. That is
10 her version of the facts.

11 I just want to underscore that, under Mitchell which
12 we cite in our brief, a Second Circuit case from 1992, agents
13 not answering questions is, as a matter of law, not
14 misleading. So if the argument is she was asking questions
15 that they were not answering, that is not something that cuts
16 in her favor here.

17 And then the third and final point is, I just want to
18 reiterate, under *Salameh*, which is a Second Circuit case from
19 1988, the Court cannot inquire into her state of mind, which is
20 the most Mr. Alonso is talking about, unless and until it finds
21 police coercion. So the order of protection, what might be in
22 her head about that or not, even if you credit her affidavit
23 on that, we don't get there because there is no coercion.
24 There is no misleading. So he is trying to conflate the
25 inquiry to make it seem like a hearing is necessary to hearing

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1 from her or from an agent, but that's just not the case.

2 THE COURT: I don't know that we are going to hear
3 from her. Presumably you would put the agent on.

4 MR. SOBELMAN: If your Honor thought that it was
5 necessary. But we don't get to the part of the inquiry the
6 defendant is focused on because even under the facts as she
7 alleged them, there is no police coercion. It's not coercion
8 to not answer a question. That's *Mitchell*. It's not coercion
9 to be nice to someone and say, look, we just want to talk to
10 you. It's going to be okay. It's not coercion to tell
11 someone truthfully that they are under arrest and handcuff
12 them.

13 And if your Honor listens to the audio recording, you
14 hear that for several minutes where the *Miranda* warnings are
15 given very simply. Some of them are repeated when she seems
16 not to understand them or not to hear them, out of an abundance
17 of caution. She executes the *Miranda* form. She is given an
18 opportunity to fix her contact. The agents could not have been
19 more accommodating in that part of the interview. And the
20 descriptions by defense counsel in their brief -- are there a
21 few minutes later in the interview that get heated? Yes. They
22 have nothing to do with the voluntary *Miranda* waiver. That
23 happened an hour earlier. So there is really nothing for the
24 Court to inquire into here.

25 THE COURT: I understand your point.

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1 MR. SOBELMAN: Thank you, your Honor.

2 THE COURT: Let's go to Mr. Poscablo. And let me try
3 to get control of my paper here. Just a moment.

4 Yes. On behalf of Mr. Brewster, Mr. Poscablo.

5 MR. POSCABLO: May it please the Court: Good
6 afternoon, your Honor, or is it still good morning? Nice to
7 see you.

8 THE COURT: It's exactly noon. Proceed.

9 MR. POSCABLO: Judge, as the Court is aware,
10 Mr. Brewster filed an omnibus motion seeking to suppress
11 evidence, including evidence seized pursuant to a search
12 warrant, the suppression of certain unsupervised audio
13 recordings made by the failed cooperator Ryan Hult, and a
14 motion for bill of particulars. In our motion we also discuss
15 *Brady, Giglio*, and the Jencks Act material. But if I could
16 just start there very quickly, your Honor, I think that the
17 Court, and the government agrees, that the Court should enter
18 a Rule 5 order with regards to Mr. Brewster.

19 THE COURT: Haven't I gone done that already?

20 MR. POSCABLO: I'm not sure that you did. I can
21 confer with the government, but I don't think so with regards
22 to Mr. Brewster.

23 THE COURT: We will do that immediately if we haven't.
24 I will check ECF.

25 MR. POSCABLO: Thank you, your Honor.

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1 I just want to address a couple of things that Mr.
2 Sobelman said.

3 THE COURT: Just a moment.

4 (Pause)

5 THE COURT: Proceed.

6 MR. POSCABLO: Judge, Mr. Sobelman, just to clarify
7 and educate a little bit with regards to Casepoint, Casepoint
8 is not as manipulable as Mr. Sobelman says, in particular
9 because thousands of pages of documents that were inserted into
10 Casepoint are photographs. There are literally photographs of
11 documents, which renders them unsearchable, and that's a
12 problem.

13 And the other thing that Mr. Sobelman mentioned is
14 that the government produced all of the Jencks Act material
15 from the prior trial, from the *Ketabchi* trial, 117 total
16 witnesses they produced, which I don't think they called all
17 those witnesses at trial, but they produced them. Those are
18 also --

19 THE COURT: When you say they produced them, they
20 produced the materials concerning, is that what you mean?

21 MR. POSCABLO: That's right, your Honor.

22 Also unsearchable. A lot of them are handwritten
23 notes. So literally the defense will have to go through
24 thousands -- hundreds or thousands of pages in order to do so.
25 We have started that, and I will -- I can represent to your

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1 Honor that Mr. Brewster's name can't be found in the batches
2 that I have looked at.

3 They have also said, well, look, we have a transcript
4 from the *Ketabchi* trial. Mr. Brewster's name did not appear in
5 that transcript.

6 They also said, well, you have all the discovery from
7 the *Ketabchi* trial. I did a -- I was able to run a search.
8 Mr. Brewster's name did not appear in that discovery. So I
9 guess my point, though, is that they have buried the defense in
10 mountains upon mountains of documents and they continue to do
11 so. They did so last night. They produced another --

12 THE COURT: Just let me stop you. I am trying to
13 understand it.

14 MR. POSCABLO: Yeah.

15 THE COURT: Doesn't what you have just told me show
16 the ease of your excluding significant swaths of the material
17 that has been given to you?

18 MR. POSCABLO: With regard to all the things in
19 *Ketabchi*, the documents that they produced and the trial
20 transcript, yes. With regards to everything else, no. And
21 part of the reason for that is, as Mr. Alonso alluded to -- it
22 is unclear what the claims are as against Mr. Brewster.

23 (Audio feedback)

24 THE COURT: We can't shut the system down because the
25 listen only mode would be disconnected. We are calling the IT

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1 people.

2 (Pause)

3 THE COURT: I'm going to step off the bench and
4 anyone who wants to leave the courtroom, stay outside. I don't
5 want people to be subjected to this noise. We will have IT
6 come up.

7 THE DEPUTY CLERK: All rise.

8 (Recess)

9 THE COURT: The problem seems to be taken care of.
10 You may be seated.

11 Mr. Poscablo, you may continue.

12 MR. POSCABLO: Thank you, your Honor.

13 Judge, I was thinking, is there a particular area you
14 would like me to start with or a particular area you would like
15 me to address?

16 THE COURT: Why don't you start with the bill of
17 particulars.

18 MR. POSCABLO: Okay. That makes sense, your Honor.

19 I don't want to belabor the points that have been
20 made, because I think Mr. Alonso's argument was precise. Even
21 though we are talking about two different charging instruments
22 here, the same principle applies. And what I had said to the
23 Court before is that millions of pages of documents have been
24 produced, and I think one of the points Mr. Alonso pointed out
25 is, even within one document, that document can have a

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1 thousand pages that needs to be reviewed, and the problem that
2 we are facing, even though, you know, we do have access to
3 this Casepoint database, is they are not searchable and the
4 handwritten notes, the photographs, you can't just rely on the
5 searches, so you have to do a document-by-document review.

6 One of the things that Mr. Sobelman said struck me,
7 when he said that this isn't about a transaction, this isn't a
8 specific transaction case, but it is, Judge. It is about a
9 hundred transactions, according to the government. There are
10 about a hundred transactions with a hundred victims.

11 THE COURT: Ms. Blakely, have somebody come up here
12 and stay here.

13 (Pause)

14 THE COURT: The system is off. Speak loudly.

15 MR. POSCABLO: Judge, this is, in fact, about a
16 hundred victims. It is about a hundred different contracts
17 with a hundred different individuals who purchased services,
18 and as a result I think what's going on here is the government,
19 who has been investigating this case for over five years, they
20 know exactly or at least they say that they know exactly what
21 this case is about, but they don't want to tell us what it is.
22 They don't want to identify for us, you know, well, which
23 transactions are you talking about? Which sales floors are you
24 talking about? Which telemarketing floors are you talking
25 about? Because they want to preserve their ability to charge

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1 a lot of different things and prove a lot of different things
2 at trial. And that makes it impossible to mount the defense.

3 If I have to argue why Joey Minetto's client that my
4 client didn't service, doesn't have a contract with, and didn't
5 in 2012 --

6 MR. SOBELMAN: Your Honor, I hate to interrupt, but we
7 are told by individuals on the audio line that now they cannot
8 hear. If your Honor would like to proceed, we would have no
9 objection, but -- oh, I'm sorry, but Mr. Brewster is on the
10 line.

11 THE COURT: All right. Let's get the IT people here.
12 Just stay in place.

13 (Pause)

14 MR. SOBELMAN: Your Honor, we are told it may be back
15 on.

16 THE DEPUTY CLERK: It should be on. I have 11 people
17 showing.

18 THE COURT: Okay. Let's proceed. Let's do two
19 tracks. Let's proceed, and let's have somebody from IT come
20 up.

21 MR. POSCABLO: I will try not to yell, then, Judge.

22 You know, the United States Supreme Court in *Dennis v.*
23 *United States* said that in a conspiracy case, particularly one
24 that was charged as broadly as this one, spanning a long time,
25 across multiple jurisdictions, and involving a lot of people,

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1 poses a significant risk of wrongful attribution of
2 responsibility to one or more of the multiple defendants.

3 (Audio feedback)

4 THE COURT: Let's wait.

5 (Pause)

6 THE COURT: I am going to step off. When the person
7 comes up, Ms. Blakely, I want him to remain here for the rest
8 of the argument.

9 THE DEPUTY CLERK: Okay.

10 (Recess)

11 THE COURT: All right. Proceed.

12 MR. POSCABLO: All right, Judge. Third time's the
13 charm. Fingers crossed.

14 Your Honor, we were talking about the bill of
15 particulars before we had to take a break. I said to the
16 Court, we make this motion because, in a conspiracy case, such
17 as this one, particularly one that is charged as broadly as
18 this one, over the course of many years, multiple
19 jurisdictions, and involving a lot of named and unnamed people,
20 it poses a significant risk of wrongful attribution of
21 responsibility to one or more of the multiple defendants, and
22 that's the Supreme Court's statement in *Dennis v. United*
23 *States*.

24 And that's one of the main reasons why we ask for a
25 bill of particulars in this case. Because, as Mr. Alonso

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1 pointed out, this is a multiyear conspiracy. I think that the
2 one they charged for Mr. Brewster is a seven-year conspiracy
3 involving ten defendants that the government stated is the
4 same exact conspiracy as the one charged in *Ketabchi*, which I
5 agree with along with Mr. Alonso.

6 Now, in response to my motion, the government argued
7 that they provided extensive detail through their discovery,
8 the mountains of documents that they produced, including
9 affidavits, and they pointed to the trial transcript.

10 THE COURT: Just a moment.

11 (Pause)

12 THE COURT: Apparently the listen-only mode people
13 were disconnected, so we are going to try to establish,
14 reestablish that. Just wait to see if we can do it. It is
15 unfortunate, but we are doing what we can. There is no -- this
16 is legal argument, this whole hearing is legal argument, so
17 there is no actual right of a defendant to be present of
18 course.

19 (Pause)

20 THE COURT: Of course I do want every defendant who
21 wants to be here to be able to be here, either listening in or
22 physically present, but we are going to proceed regardless.

23 I think we have reestablished that listen-only mode
24 call. Go ahead, sir.

25 MR. POSCABLO: Thank you, your Honor. Before the

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1 technical difficulties, we were speaking with the Court about
2 the bill of particulars motion that Mr. Brewster filed, and I
3 echo in many of the argument -- I echo many --

4 THE COURT: What is it that you want in the bill of
5 particulars? I'm going to ask Mr. Alonso the same thing,
6 because Mr. Alonso, I think, was a little hard to follow
7 exactly what areas he wanted.

8 What are the areas that you want, and I also -- well,
9 go ahead. Let's start with that.

10 MR. POSCABLO: Well, Judge, I actually, you know,
11 reviewed Mr. Alonso's brief on behalf of his client, Ms. Shah,
12 and I think that the way that he outlined it is exactly right.

13 THE COURT: All right. Mr. Alonso, what are the now
14 current areas that you want? You were talking about how you
15 wanted a particular area. Go ahead, Mr. Alonso.

16 MR. ALONSO: They are --

17 THE COURT: One, two, three.

18 MR. ALONSO: One, purchasers, victims; two,
19 conspirators; three, the precise business services that they
20 are talking about; four, sales floors --

21 THE COURT: Just a moment. Yeah.

22 MR. ALONSO: -- and, five, money laundering activities
23 under Count Two. Count Two is a similarly broad eight-year
24 conspiracy.

25 THE COURT: When you say money laundering activities,

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1 what are you asking for?

2 MR. ALONSO: I'm asking for whatever it is they mean
3 by money laundering activities. The Count Two is similarly
4 vague, as Count One, so it talks about --

5 THE COURT: All right. Victims, conspirators,
6 business services, sales floors, money laundering activities.
7 Thank you.

8 Mr. Poscablo.

9 MR. POSCABLO: Judge, can I just add to that, because
10 I think Mr. Alonso's initially had two more, which is, the
11 fulfillment companies, and when he said business services, he
12 also, I think, in his brief wrote coaching, coaching services;
13 and, lastly, time frame, your Honor.

14 THE COURT: The time frame in the indictment.

15 MR. POSCABLO: Well, Judge, that may be correct that
16 they charge a seven-year time frame, but if you look at the
17 specific affidavits in particular -- we will go over one
18 today, the one affidavit that relies on Ryan Hult -- we are
19 talking about a six-month period of time from 2018 to 2019.
20 What I am trying to understand from the government is are they
21 saying that Mr. Brewster -- when did Mr. Brewster purportedly
22 enter this conspiracy? It's not clear from the indictment, and
23 so I would like to know that.

24 THE COURT: All right. Go ahead.

25 MR. POSCABLO: That is really it for the bill of

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1 particulars, your Honor.

2 If there are other things that you want to ask --

3 THE COURT: Let me ask the government, with those
4 items in mind, government, those seven items in mind, how has
5 your production been organized in a way that that information
6 can or cannot be obtained by the defense?

7 MR. SOBELMAN: I'm happy to go through them
8 individually, your Honor.

9 THE COURT: Go ahead.

10 MR. SOBELMAN: With respect to victims, our production
11 has sales records, e-mails with particular victims,
12 communications with particular victims.

13 THE COURT: How do they know who the victims are? To
14 what extent can they determine from your production who the
15 victims are?

16 MR. SOBELMAN: Those are the victims, your Honor.

17 THE COURT: Who are?

18 MR. SOBELMAN: The people --

19 THE COURT: Who are the victims?

20 MR. SOBELMAN: The people to whom sales were made. I
21 mean, that is the universe of victims that we are talking
22 about. There was no victim that we are going to put forth at
23 trial for whom we do not have some type of record --

24 THE COURT: Is that hundreds of people? Thousands of
25 people? It's hundreds of people.

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1 MR. SOBELMAN: Probably thousands, your Honor.

2 THE COURT: All right. How are they to make sense of
3 that?

4 MR. SOBELMAN: The same way that defendants make sense
5 of it in any large-scale fraud case. There are no cases, your
6 Honor, with thousands of victims where the Court has ordered
7 that we enumerate each one. It's not practical. It's a
8 conspiracy case, where we are seeking to prove an agreement.

9 THE COURT: How do the defendants -- I take it you are
10 not producing, or are you, producing files to them under the
11 category of victims?

12 MR. SOBELMAN: May I just talk to Ms. Fletcher for a
13 moment?

14 THE COURT: Yes, of course.

15 MR. POSCABLO: They have not, Judge.

16 (Counsel confer)

17 MR. SOBELMAN: Your Honor, there are a few categories
18 of documents that --

19 THE COURT: Talk to Ms. Fletcher or anyone you need
20 to. My questions are, how is your production organized such
21 that this information, each of those seven categories, can be
22 obtained by the defense? So talk to her. Ms. Fletcher, you
23 certainly can speak, if you are the expert on this. It makes
24 no difference to me.

25 MR. SOBELMAN: Your Honor, I just want to make one

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1 point, which I am happy to circle back to more substantively,
2 which is, under the law, the defendants are not entitled to
3 any of these things. So to the extent your Honor is
4 considering ordering us to give them some of these things, I
5 just want the opportunity to go back and point you to some
6 cases that show that they are not entitled to them.

7 THE COURT: Okay.

8 MR. SOBELMAN: I understand your Honor asking a
9 practical question, and I am happy to answer it.

10 THE COURT: Yes.

11 MR. SOBELMAN: Our --

12 THE COURT: That can perhaps obviate the case
13 analysis --

14 MR. SOBELMAN: Understood, your Honor.

15 THE COURT: -- but in the interest of having this
16 October date actually go forward and getting them the
17 information. Go ahead.

18 MR. SOBELMAN: Yes, your Honor, and we have no
19 interest in hiding the ball and every interest in helping the
20 defense identify relevant items.

21 THE COURT: The government is here to help them and
22 they are here to help you. I understand. Proceed.

23 MR. SOBELMAN: Yes, your Honor.

24 Production is generally organized by source. So there
25 are victim names, identifiers, documents in a variety of

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1 different places. One is the internal business records of the
2 various sales floors that have communications with them, that
3 have lead lists or sales lists, that have victims names and
4 identifying information, and the sales data associated with
5 those individuals. We have --

6 THE COURT: It's your position that everything that
7 every sales floor -- every person that every sales floor
8 entered into a contract with is part of this conspiracy?

9 MR. SOBELMAN: No, your Honor. It potentially could
10 be. We have not interviewed every person listed in the
11 documents. We have interviewed a lot of people, but we have
12 not and will not interview every single person. It is the
13 same as any other, you know, large-scale conspiracy. Our goal
14 and what we intend to prove at trial is that these people
15 agreed to commit this crime, and we will show that there were
16 many acts taken in furtherance of that crime, but our view, as
17 I said earlier, this is sort of a *Tuzman* "all or most" case,
18 not a "handful of discrete acts" case. But we don't know, we
19 don't have documents from or interviews with every single
20 potential victim, same as in the *Ketabchi* case.

21 But in terms of the defense being able to identify
22 victims, we have the internal business records, sales records,
23 lead lists from the sales floors and fulfillment floors and the
24 coaching floors. There are documents the victims provide us
25 which we --

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1 THE COURT: And how are those, again, produced to the
2 defense?

3 MR. SOBELMAN: In a few different ways. It depends
4 where they come from.

5 So, for example, if they are from a Google share
6 drive that we obtained, they are within the Google share drive,
7 and we say Google share drive from X account.

8 If it's from the computer sales floor, they are
9 produced, when we -- if they request the contents of that
10 computer.

11 If it's from an e-mail search warrant that we did, it
12 is in the set of materials that's in that account.

13 We have not gone through, for our own purposes or for
14 the defense, and pulled out every document that lists a victim
15 on it. There are -- it is voluminous. But in order to -- for
16 us to try the case or for them to try the case, no one needs to
17 identify every single of the thousands of people that were
18 marketed to in the course of the scheme. It's just not going
19 to be part of the case. If that's something they want to do
20 and they want more time to do it, again, we have no objection
21 if they want more time to review discovery materials which are
22 substantial in this case, but this is not -- it's not like we
23 have a comprehensive list that we are sitting on and we could
24 just hand over pursuant to a Court order. It would be --

25 MR. POSCABLO: But they do have that, your Honor. they

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1 do have that. They know which victims that they want to put on
2 trial.

3 THE COURT: No, but you are not entitled to your
4 witness list now.

5 MR. POSCABLO: Understood. But what they are
6 saying --

7 THE COURT: You will get it, but you are not entitled
8 to it.

9 MR. POSCABLO: That's right.

10 MR. SOBELMAN: And, your Honor, the --

11 MR. POSCABLO: But what they are saying --

12 THE COURT: Let me hear Mr. Poscablo.

13 MR. POSCABLO: What they are saying is there are
14 thousands of victims on hundreds of pages of discovery, and
15 every single one of them is a victim in this case.

16 THE COURT: I have to do this in an orderly fashion.
17 Let Mr. Sobelman respond to those seven items.

18 MR. SOBELMAN: Your Honor, just on this first item and
19 then I can move on, one thing that's interesting about the
20 defense argument here is, the documents I am talking about are
21 their documents. So the defense is almost certainly in a
22 better position to know how their own clients and their
23 coconspirators saved and categorized these items. So the most
24 compelling documents for Mr. Brewster's counsel are going to be
25 the documents that were on Mr. Brewster's computer, in his

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1 e-mail, on the computers --

2 THE COURT: But it is a conspiracy case, sir.

3 MR. SOBELMAN: Agreed, your Honor. I'm just saying
4 the victims that we would call for a Brewster trial are going
5 to be victims of Brewster's floor. So the -- it's not that
6 they have to identify and look at every single victim of the
7 overall conspiracy. There is a way for them to be targeted
8 about their review and identification of the materials and to
9 the extent they want to do their own investigation, it is not
10 boundless.

11 THE COURT: Conspirators.

12 MR. SOBELMAN: Yes, your Honor.

13 THE COURT: 41 names. List. Go ahead.

14 MR. SOBELMAN: Yes. We gave Ms. Shah a list of 41
15 names and entities, both individuals and entities that were
16 involved in the scheme. As far as we are concerned, the
17 coconspirator request is just something trying to bind us.
18 They have the notice that they are entitled to. If
19 Mr. Brewster wants a similar --

20 THE COURT: What is the 41 -- the 41 names are those
21 who you claim are her coconspirators, correct?

22 MR. SOBELMAN: It's individuals and entities that were
23 involved, that were in sort of her orbit of her involvement in
24 the scheme. So we don't want to bind ourself, because our
25 investigation is ongoing and we are still beginning our

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1 preparations for trial, but the coconspirators who would be
2 relevant to her trial, we believe, are on that list.

3 THE COURT: Business services and coaching services,
4 in other words, that's Mr. Alonso's list --

5 MR. SOBELMAN: Yes, your Honor.

6 THE COURT: -- taken from the *Ketabchi* summation,
7 which were essentially the services that were offered by the
8 sales floors in that conspiracy.

9 MR. SOBELMAN: Yes, your Honor. Just on the
10 coconspirator point, we have not given a similar list to
11 Mr. Brewster. He never -- really didn't ask for one. If he
12 wants us to do something similar, because we haven't had the
13 kind of dialogue with him that we had with Ms. Shah's counsel,
14 we are happy to have that same dialogue with him and --

15 THE COURT: Have the dialogue with anyone who wants a
16 dialogue. Remember, you are the government and you are here to
17 help them. You just told me that.

18 MR. SOBELMAN: Yes, your Honor, but we can't answer
19 questions that are not asked of us.

20 THE COURT: No, I understand that. Proceed.

21 MR. SOBELMAN: With respect to the business services,
22 they have notice. It's in the indictment. It's in the search
23 warrants. We give --

24 THE COURT: It's not in the indictment, the specific
25 services.

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1 MR. SOBELMAN: Yes, your Honor. A number of them are
2 named. We quote that portion of the indictment in our
3 opposition.

4 (Pause)

5 THE COURT: I'm reading the original indictment, sir.
6 Show me.

7 MR. POSCABLO: It's not in the indictment, Judge.

8 THE COURT: Let him finish.

9 MR. POSCABLO: Sorry.

10 THE COURT: I will give you a full opportunity, sir.

11 MR. POSCABLO: I'm sorry, your Honor.

12 MR. SOBELMAN: Your Honor, I was looking at the
13 superseding indictment, although they sort of are --
14 essentially they are the same.

15 THE COURT: Which one are you looking at? S4?

16 MR. SOBELMAN: Yes, your Honor, on page -- I believe
17 it is 3 of the indictment. It lists examples of business
18 services as coaching sessions, tax preparation, or website
19 design services, and electronic or paper pamphlets.

20 THE COURT: Just a moment. I'm trying to find it.

21 MR. SOBELMAN: Yes, your Honor. Take your time,
22 please.

23 THE COURT: What indictment are you on?

24 MR. SOBELMAN: This is the S4 indictment, at page --

25 THE COURT: S4 indictment, page 3.

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1 MR. SOBELMAN: Yes, your Honor.

2 THE COURT: Paragraph? I see it, paragraph 4. Tax
3 preparation or website design services.

4 All right. Proceed. Go ahead.

5 MR. SOBELMAN: There are also other lists of similar
6 services in our search warrant affidavits that provide adequate
7 notice, and we pointed to the *Ketabchi* trial record, which
8 defense counsel quoted from. All of those are also applicable.
9 That's why we keep pointing to that record. The only one that
10 would not come up in this trial would be *Youngevity*. But the
11 rest of those are all part of the same scheme, which is why we
12 keep --

13 THE COURT: Have you told them that? Did you tell
14 them that? You are the government.

15 MR. SOBELMAN: Yes. It's in our motion -- it's in our
16 opposition to Ms. Shah's brief, on page 30, where we said they
17 have notice of this because it's in these three places.

18 THE COURT: All right. Go ahead.

19 MR. SOBELMAN: With respect to the sales floors, I
20 understand that is only -- again, that's part of the list we
21 gave Ms. Shah's counsel for her. We are happy to give a
22 similar list to Mr. Brewster.

23 THE COURT: Are there hundreds of sales floors?

24 MR. SOBELMAN: No, there are not. There certainly
25 won't be hundreds mentioned at trial. It will be ten to 20.

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1 And we are, again, happy to talk to counsel and give them a
2 list of sales floors that --

3 THE COURT: Do that.

4 MR. SOBELMAN: -- are in that ten to 20.

5 THE COURT: Do that.

6 MR. SOBELMAN: We did for Ms. Shah, and we are happy
7 to do that for Mr. Brewster.

8 THE COURT: All right.

9 MR. SOBELMAN: The sort of money laundering activities
10 ask, the transactions at -- you know, first of all, it's a
11 conspiracy, not any particular transaction, which is important.
12 Obviously if this were a case with a particular transaction,
13 we would identify that transaction. It is a conspiracy. And
14 the transactions that we would likely or potentially put
15 evidence on at trial are all within the financial records that
16 we have produced, although some of the evidence of that
17 conspiracy, maybe the majority of it, would likely be through
18 cooperator testimony that we have no obligation to disclose at
19 this time.

20 THE COURT: Well, fulfillment company.

21 MR. SOBELMAN: Yeah, and same thing for Brewster. The
22 money laundering evidence is in his own bank records. So it's
23 not as if there is something else that we are hiding the ball
24 on. These are transactions that he engaged in.

25 THE COURT: Fulfillment companies.

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1 MR. SOBELMAN: Your Honor --

2 THE COURT: This is Mr. Brewster.

3 MR. SOBELMAN: Yes. Ms. Shah withdrew her request for
4 that because she realized they are in the list that we gave
5 her. We are happy to do the same for Mr. Brewster and give him
6 a list of companies that we think will be relevant to his
7 trial.

8 THE COURT: Well, why haven't you had these
9 discussions beforehand? Do that.

10 MR. SOBELMAN: Your Honor, he hasn't asked.

11 THE COURT: If they haven't asked for them, you are
12 under no obligation to volunteer. I understand that.

13 Time frame.

14 MR. SOBELMAN: Time frame, your Honor was entirely
15 correct, which is, the time frame is listed in the indictment,
16 and there is, not to turn to a legal issue, but a ton of case
17 law on this that we have no obligation to specify precisely
18 when a defendant joined the conspiracy. It's, frankly, not
19 even relevant to the trial. We have to show that at some point
20 they were a member of the conspiracy. We don't have to prove
21 and the jury will be instructed we don't have to prove that he
22 was a member at any particular point in time other than the
23 date range provided.

24 THE COURT: All right. Thank you.

25 Mr. Poscablo, that narrowed some of the --

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1 MR. SOBELMAN: I just want to add one thing. That
2 being said, we are happy to talk to Mr. Poscablo and, like we
3 did in our opposition for Ms. Shah's brief, give him sort of a
4 sketch of where we understand he was -- what he was doing at
5 various points in time during the conspiracy.

6 THE COURT: Do it.

7 MR. SOBELMAN: We are happy to.

8 THE COURT: All right. Do it.

9 Mr. Poscablo, back to you, sir.

10 MR. POSCABLO: I'm sorry for interrupting earlier,
11 your Honor.

12 THE COURT: Go ahead.

13 MR. POSCABLO: So --

14 THE COURT: This has helped now definitely. You will
15 get a list of fulfillment companies. You will get a list of
16 sales floors.

17 Go ahead.

18 MR. POSCABLO: And I agree with that all of that.

19 THE COURT: You have got the coconspirators.

20 MR. POSCABLO: The issue I still have is with the
21 victims. And if I may explain to the Court how I believe they
22 have produced it, they have produced -- there will be a
23 document or a series of documents, a thousand pages in
24 Casepoint, and it will list in the discovery letter "Citigroup
25 bank records." We have got to go through every single one of

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1 them to see, okay, well, that is not my client's. Oh, I think
2 that's, you know, Ketabchi's. That's a name I don't
3 understand. Sometimes it is redacted. Sometimes the number is
4 redacted. I can posit that it's a victim, but I don't know
5 that. And if what they are saying is every person in this
6 conspiracy was a victim, then it would take us years to
7 identify them, interview them, and prepare for a trial if we
8 don't understand -- if we don't narrow the scope of who these
9 victims are.

10 THE COURT: You are going to get the list of
11 witnesses. You are going to get that. You are going to get
12 the government exhibits. You are going to get the 3500
13 material. You are going to get the *Giglio* material.

14 MR. POSCABLO: Then I guess we will just have to wait
15 for that, but that's really what the issue is here, Judge.

16 THE COURT: And I want parties to be discussing a time
17 frame, because if you can't agree upon a time frame -- and
18 normally parties can for pretrial disclosures -- then I want to
19 do it, and I want to do it rather expeditiously.

20 Next.

21 MR. POSCABLO: Judge, I know we are going to talk
22 about this later, I think, after this, but I am concerned about
23 the date of this trial and the reason is, you know, they
24 produced --

25 THE COURT: Let's go through your motion, then we will

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1 talk about the date, and then I will let everybody have lunch.
2 Go ahead.

3 MR. POSCABLO: What would you like for me to turn to
4 next, your Honor? Perhaps we can talk about the motion to
5 suppress evidence.

6 THE COURT: Absolutely. That's how you did it in your
7 brief. Go ahead.

8 MR. POSCABLO: Your Honor, the affidavit of Special
9 Agent Jesse Imbergamo of Homeland Security Investigations
10 contains false statements and admissions that undermine the
11 validity of the warrant.

12 THE COURT: No, but they are so minor, as I see it,
13 from what you have. It is the same -- in a way, the same as
14 Mr. Alonso, the word "operations," the word that you -- Money
15 Sucking Website was nefarious. There is nothing material
16 here. It omitted the fact that an injunction was entered
17 against one of the cooperating witnesses. Adjectives are
18 inflammatory. That's not the heart of the search warrant. The
19 search warrant seems to have accurate material, at least
20 insofar as it was known. The government in that -- it goes
21 both to the West Fourth search and East Tropicana search, at
22 least as I see it, sir.

23 MR. POSCABLO: Judge, the criminal cause as against
24 Mr. Brewster is captured in one paragraph, paragraph 9, with
25 five subparagraphs. And all of them rely on Ryan Hult, who is

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1 identified in the search warrant as CW3.

2 Now, we know who Ryan Hult is. Your Honor is very
3 familiar with Ryan Hult. He is the failed cooperator who lied
4 to you, lied to the government, lied to his defense counsel,
5 and committed crimes while he was a cooperating witness, and
6 did not get a 5K from the government as a result.

7 THE COURT: And what are you asking me to draw from
8 that?

9 MR. POSCABLO: I'm asking to you draw from that that
10 the information that he provided, which the agent relied on in
11 affecting this warrant, is false. He said Brewster and
12 McMurtrey operated a website. They just know it's not true.
13 That is just not true. They know it's not true. And the way
14 we know that is because, in subsequent situations, they have
15 said that it's not actually operating.

16 You can look at the indictment, your Honor. And let
17 me point your Honor to the indictment in this case. This is
18 what they wrote about that. "Brewster, for example" -- and I
19 am quoting from page 3, paragraph 3 of the indictment. This is
20 the first indictment in this case. "Brewster, for example,
21 provided lead lists generated through a website referred to by
22 Brewster and other coconspirators as the Money Sucking
23 Website."

24 That is wholly different, wholly different, than what
25 they say in order to convince this magistrate judge to grant

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1 this warrant. They say he operated it. I'm not quibbling with
2 language here, but they didn't say that in the indictment
3 because they knew it wasn't true. But in the search warrant
4 they did. They made it seem like he was -- he owned it, but in
5 the indictment they didn't. In the indictment they said he
6 sold lead lists from it. That's what they know to be true.

7 And if you look at paragraph C, I mean, that's really
8 all we are talking about. Paragraph E, where we are saying
9 that he operated Money Sucking Website. If you throw that out,
10 what do you really have here? Well, you have the consensual
11 recording, which I will -- you know, happy to discuss, but then
12 you have paragraph E that says he stopped talking to the
13 cooperator because he heard people were getting arrested.
14 Judge, he stopped talking to the cooperator because he didn't
15 want to do business with him because the cooperator kept trying
16 to induce him to say things and do things and he is like, I
17 have no reason to talk to you anymore.

18 And then in paragraph E, they say that they talked to
19 several victims of Brewster's telemarketing floor, each of whom
20 was convinced to invest in purported business services based on
21 a salesperson's false representation, a salesperson's false
22 representation. To Mr. Alonso's point, it doesn't even say
23 that Mr. Brewster made that representation. It says someone on
24 his -- it doesn't -- it says in fact someone else did it. How
25 is that tied to Mr. Brewster?

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1 And to that point, Judge, Mr. Alonso made a great
2 point earlier when he was talking about the language in the
3 indictment for Ms. Shah, and that was insufficient because it
4 said, if you remember, "at no point did the defendant intend
5 that the victims would actually earn any of the promised
6 return." They don't even say that in the indictment against
7 Mr. Brewster. All it says is, "But at no point did the victims
8 actually earn." They didn't even say the word "intent" because
9 they can't, because they didn't. And it's clear from this
10 search warrant that Mr. Brewster is not alleged to have said
11 anything or made any false representations to any victims.

12 So if you take away everything that Mr. Hult said, you
13 are left with a very generic explanation of what the scheme is.
14 And I offer to your Honor that that is insufficient to
15 establish probable cause, and I think a *Franks* hearing is
16 appropriate here.

17 THE COURT: All right. I will want Mr. Sobelman --
18 you might as well do it now, sir.

19 MR. SOBELMAN: Yes, your Honor.

20 Defense does not come close to establishing the type
21 of showing that would be required for a *Franks* hearing. "A
22 defendant must make a substantial ordinary showing that a
23 deliberate falsehood or statement made with reckless disregard
24 for the truth was included in the warrant affidavit and the
25 statement was necessary to the judge's finding of probable

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1 cause."

2 THE COURT: But what Mr. Poscablo --

3 MR. POSCABLO: Your Honor --

4 THE COURT: -- wants you to do, wants me to do, is
5 throw out the reliance on Hult and look at what you are left
6 with.

7 MR. SOBELMAN: And there is literally no legal basis
8 to do that. The information reported from Hult was accurately
9 reported by the agent, and that is the only analysis is that
10 the agent accurately reported the information from a third
11 party. You don't then say, okay, well, maybe the third party
12 was wrong or the third party was lying.

13 Even if Hult had lied to the agent, which he did not
14 do -- and Mr. Poscablo is wrong when he suggested that Hult
15 lied to us or to the Court. He did violate his cooperation
16 agreement, as your Honor knows, by committing other crimes,
17 after this search warrant was sworn out, at least to the
18 government's knowledge at that time. He did violate his
19 cooperation agreement. He is a failed cooperator.

20 THE COURT: You are talking about the good faith of
21 the agent in reporting what Mr. Hult told him. At that time he
22 had no reason then to think that any of this was inaccurate.
23 Is that your point?

24 MR. SOBELMAN: That's correct, your Honor, although
25 it's not a good-faith exception case, although the good-faith

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1 exception would also apply, although the types of allegations
2 here don't make it directly applicable. But the point is, the
3 case law is very clear that if third-party statements are being
4 reported in an affidavit, you look at the knowledge of the
5 person reporting those statements, not the underlying
6 statements themselves. So there is no basis to throw out
7 Hult's statements at all.

8 The things that might have impeached his credibility
9 either were not known to the government at the time, such as
10 his narcotics conduct, or are, as the Court already suggested,
11 immaterial like, the fact he might have violated an FTC order.
12 We disclosed in the affidavit that he had pled guilty to
13 multiple fraud crimes and was providing assistance in the hopes
14 of obtaining leniency at sentencing. That was more than
15 enough.

16 If your Honor looks at the *Cook* case which is SDNY
17 2004, and cited in our brief, "Information accurately reported
18 by an affiant cannot be challenged for the alleged inaccuracy
19 of the information provided by the third party," and that's
20 what the defendant is trying to do here, is reach through --

21 THE COURT: All right. I understand that point.
22 Anything else?

23 MR. SOBELMAN: No, your Honor.

24 THE COURT: Okay.

25 MR. POSCABLO: But, Judge, in response to that, look

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1 at what paragraph 9 says. It doesn't say that Special Agent
2 Imbergamo spoke to CW3. It says that "Special Agent Imbergamo
3 had conversations with other law enforcement agents and
4 reviewed law enforcement reports and learned the following."
5 Then they learned -- then she lays out what Ryan Hult falsely
6 told the government and they relied on it. And here is my
7 argument to that.

8 They knew that paragraph B, which says that
9 Mr. Brewster owned and operated Money Sucking Website and then
10 paragraph C, where they cite a consensual recording that they
11 say Mr. Brewster says, even in that conversation, that recorded
12 conversation, your Honor, which we transcribed for the Court in
13 our declaration, Ryan Hult is talking about another person. He
14 is talking about the actual owner of Money Sucking Website.
15 And so my point is that they want to say that Ryan Hult lied to
16 them and told them, oh, Money Sucking Website was owned by
17 Cameron Brewster and that's how they got probable cause, but
18 now they want to say, well, we didn't know that he was lying,
19 but they did.

20 THE COURT: I understand the point. Let's go on.

21 MR. POSCABLO: I think I can move on --

22 THE COURT: Suppression of the Hult calls.

23 MR. POSCABLO: Yes, your Honor. I don't need to go
24 into an explanation of who Ryan Hult is, but I will tell this
25 to the Court. It appears that -- I listened to all those

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1 calls, and I think -- and, again, the government produced, I
2 think, over 40 hours worth of calls. I mean, last night the
3 government produced a chart, it is four pages long, of all the
4 calls Mr. Hult made and recorded in this case. I can represent
5 to the Court that the calls I listened to for Mr. Brewster
6 didn't have a preamble, "this is special agent so-and-so, this
7 is July 1, 2021."

8 THE COURT: So?

9 MR. POSCABLO: So the point is that Mr. Hult was
10 running rampant making these calls. There is no indicia of
11 reliability as to when the calls were made. What was he
12 recording? When was he recording them?

13 THE COURT: Where do you find the obligation for the
14 government to turn that over? You can attack the calls if you
15 think they are not reliable. Where in the law is there an
16 obligation for them to tell you that?

17 MR. POSCABLO: I can, and you are right, Judge. Here
18 is my argument. My argument is this: The government says that
19 he made all these calls under the color of law enforcement
20 authority. Okay? But there is no --

21 THE COURT: Battle it out at trial.

22 MR. POSCABLO: There is no indication of that here.

23 THE COURT: Battle it out at trial. That's a good
24 argument. Make it to a jury.

25 MR. POSCABLO: They produced no discovery about it.

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1 THE COURT: I don't think that changes my comment.

2 MR. POSCABLO: Okay.

3 THE COURT: All right. Move on.

4 MR. POSCABLO: Judge, like Mr. Alonso said, I'm not
5 asking --

6 THE COURT: Your next one is *Brady*, *Giglio*, and
7 Jencks.

8 MR. POSCABLO: Oh, right. I'm sorry. On the *Brady*
9 matter, I think Ms. Blakely was looking into whether an order
10 has been issued.

11 THE COURT: It has not, and we are going to get one
12 out.

13 MR. POSCABLO: Thank you, your Honor. We ask that it
14 be the same order that was issued for Ms. Shah.

15 THE COURT: I'm obviously going to look at it, but I
16 don't think promptly means immediately.

17 MR. POSCABLO: Yes, your Honor.

18 I do have a *Brady* issue to raise, and I raised it with
19 the government many, many months ago, and it is this. It is
20 that I have come to learn that Detective Bastos, in his calls
21 and outreach to witnesses, left messages saying: You are a
22 victim of a fraud, please give me a call. We will battle that
23 out at trial and the bias they have added, and I don't know
24 whether -- they didn't call Bastos in the last trial. They
25 might call him here. But I think that's problematic.

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1 But here is the point: This particular purchaser
2 called Detective Bostos back and said, hey, I don't know what
3 you are talking about. I am perfectly fine and happy. I asked
4 the government to search for any reports or indication that
5 that -- that there was something like that, that there was a
6 report like that. They told me no.

7 THE COURT: That there was a report.

8 MR. POSCABLO: Yeah, so, you know, if a detective
9 calls a witness or a potential victim and they --

10 THE COURT: Here is what you are saying, if I
11 understand.

12 MR. POSCABLO: Yes, your Honor.

13 THE COURT: The detective calls individual A, says you
14 have been a victim of a fraud. You are asking for some
15 substantiation of that statement.

16 MR. POSCABLO: Correct, your Honor. Correct. And I
17 was told that there was none.

18 Now, that -- in my mind, that is problematic. Because
19 what that means, and I think what that might mean is that
20 reports weren't written if a victim didn't respond or a victim
21 responded negatively. And so that is the request for the
22 government, is that, similar to Mr. Alonso's request, they may
23 not have a writing about it, but they need to probe their
24 agents to see if certain conversations like that took place.
25 And if so, then that 100 number it's really relative, because

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1 if they called, you know, 200 people and a hundred people said,
2 hey, I wasn't victimized, well, that's a different number
3 altogether than 100 percent of the people were victims.

4 So I asked the government to produce that and look
5 into that, and I just wanted to alert the Court to that.

6 THE COURT: That's fine. That's something for
7 discussion between the parties.

8 MR. POSCABLO: Thank you, your Honor.

9 THE COURT: Mr. Sobelman, did you want to saying
10 something now?

11 MR. SOBELMAN: Briefly, your Honor.

12 This is one of the things we have talked to
13 Mr. Poscablo about I think very shortly after he filed this
14 motion or maybe even before he filed the motion. We probed our
15 files. We have spoken with the agents. We don't know what
16 interaction that might have been. To the extent Mr. Poscablo
17 can give us -- we have asked and he declined -- any more
18 information about when or the person's name, it might be that
19 there is something there that we are not aware of and can't
20 find, but without more information, we have done the search we
21 can do.

22 THE COURT: All right.

23 Mr. Poscablo.

24 MR. POSCABLO: Your Honor, as to the Jencks material,
25 and I think the parties will hash this out, but I will say that

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1 if it is the 55,000 pages of Jencks material that they produced
2 to us related to the *Ketabchi* case, we are going to need more
3 than two weeks -- 5500, I'm sorry, 5500, it's going to be -- we
4 are going to require more than two weeks, as the government
5 stated earlier, to review that.

6 THE COURT: Don't tell me that now. If the parties
7 are going to discuss that, if they can't reach an expeditious
8 conclusion, I will decide.

9 MR. POSCABLO: Yes, your Honor.

10 And to end, I made a similar request that the Court
11 review *in camera* the grand jury testimony that had to do with
12 Mr. Hult because my -- based on what I am seeing here is that
13 the government's initial case relied almost entirely on
14 Mr. Hult as against Mr. Brewster, and all I am asking is that
15 the Court review *in camera* the testimony that was given that
16 relied on Mr. Hult's information.

17 THE COURT: All right. I understand. I will look at
18 all of this.

19 I was going to render decisions today. I don't feel I
20 am -- I should. There are some things I need to think about,
21 some of the case law that's been cited. So I'm not going to
22 render decisions today.

23 On the 6(e), I just don't see it. The protections of
24 6(e) are so important, there is nothing that rises to the
25 particular need here, I can tell you, on grand jury. I think

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1 that's it. Correct?

2 MR. POSCABLO: I think that's it, your Honor.

3 THE COURT: Okay. Let me tell you, I have said now, I
4 am not going to render decisions. I can to the extent I am
5 denying the request for the *in camera* review or production of
6 the grand jury materials. The allegations simply don't rise to
7 the standard of my reaching 6(e) here and having either *in*
8 *camera* -- not really reach if I do it *in camera*, but there is
9 no need for me to do it *in camera*.

10 Mr. Alonso, you withdraw your request for the *Franks*
11 hearing, correct?

12 MR. ALONSO: Correct, your Honor.

13 THE COURT: I think I have a sense of the
14 production -- of how these documents were produced. I want the
15 parties to continue to talk about the bill of particulars
16 issue. I think I have made some headway here. Talk to each
17 other. Each of the parties here, Brewster and Shah, have said
18 they want to file additional motions if need be. I don't have
19 to rule on that. If something arises where a motion is
20 necessary, make your motion.

21 I think that's as far as I can take it today. I
22 certainly intend to get you a decision on the outstanding
23 things as soon as I can.

24 Anything else, government?

25 MR. SOBELMAN: Your Honor, very quick issue I just

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1 want to flag --

2 THE COURT: Oh, we want to talk about timing of the
3 trial.

4 MR. SOBELMAN: Yes.

5 THE COURT: Of course. I heard things wafting by that
6 I didn't like hearing. The defense, both Brewster and Shah,
7 say they are prepared to go to trial. The government is always
8 prepared to go to trial. I'm not going to try this case in
9 multiple tranches. I am going to try it once. We have an
10 October date. What is the issue, sir? I can sense it is out
11 there. What is it?

12 MR. SOBELMAN: So the issue the government wants to
13 raise is that our understanding is that the current structure
14 for trials only permits two defendants at a time and there is
15 actually a third defendant, Chad Allen, who we think is also
16 going to go to trial, and so we just wanted guidance from the
17 Court.

18 THE COURT: You are talking COVID? Is that what you
19 are talking.

20 MR. SOBELMAN: Correct, your Honor.

21 THE COURT: The structure.

22 MR. SOBELMAN: Yes.

23 THE COURT: You are talking about -- we don't know
24 what the state of COVID is going to be in October. I will
25 do -- we will see what it is. I will do whatever I can to

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1 make sure that we have COVID compliant courtrooms. If it
2 requires taking out some of the spectator seats and instead
3 having another defense table in what now is on the other side
4 of the bar, we will do that. Maybe we can commandeer some
5 witness rooms for counsel to be able to spread out. I will do
6 what I can. Everything will be COVID compliant. I can assure
7 the parties that. If your issue is COVID compliance, leave it
8 in the hands of the COVID subcommittee of the Board of Judges
9 and my gentle ministrations in getting a COVID compliant
10 courtroom.

11 MR. SOBELMAN: Happy to do that, your Honor. I was
12 just flagging because our current understand is there a
13 two-defendant limit for any trials.

14 THE COURT: There is.

15 MR. SOBELMAN: So to the extent that continues and
16 your Honor is not able to navigate around it, we would just be
17 grateful if -- maybe today is not the time, but at whatever
18 point, we would be grateful for guidance on how you want the
19 parties to discuss, assuming you do, which defendant or
20 defendants would go first. But it sounds like it might be
21 premature.

22 THE COURT: A, premature; B, I'm not having two trials
23 here.

24 MR. SOBELMAN: That's why we were flagging it.

25 THE COURT: All right.

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1 MR. SOBELMAN: Thank you.

2 THE COURT: To the extent --

3 MR. POSCABLO: Judge, may I?

4 THE COURT: To the extent I can, I will take care of
5 it. To the extent I can't, we may have an adjournment of the
6 trial. We don't know what the COVID situation is going to be.
7 It changes every day. Today it doesn't look so good, I must
8 say, from the rise of this new variant.

9 MR. POSCABLO: Your Honor --

10 THE COURT: But I will do everything I can just to
11 have this tried on the date set.

12 MR. SOBELMAN: Just one more data point. In the event
13 that there are two trials -- and just something for the Court
14 to consider -- we do think there is actually a good way to
15 split it. There is much more overlap in our case, as we can
16 currently conceive it, between Brewster and Shah than there is
17 with Allen.

18 But, again, it sounds like it is premature. I just
19 wanted to flag for your Honor that --

20 THE COURT: You have.

21 MR. SOBELMAN: -- we thought about it.

22 THE COURT: Thank you.

23 MR. POSCABLO: Judge, I beg your indulgence. I
24 represent an individual in the Southern District of Illinois,
25 and that Court has set a firm trial date, it appears, for

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1 October 18. I was waiting to see if we were actually going to
2 move forward on the 24th before I asked that Court to adjourn
3 that trial, and I didn't want to do that, because I was worried
4 that what would happen is, I would move that to January, and
5 then your Honor would want to move this one to January because
6 of COVID protocols because of everything else.

7 THE COURT: Welcome to real life.

8 MR. POSCABLO: So I guess what I am asking --

9 THE COURT: All I can tell you is what I have told
10 you. Go ahead, sir.

11 MR. POSCABLO: I guess what I am asking, your
12 Honor -- and I can make this in a letter to explain to the
13 Court -- on behalf of Mr. Brewster, we are asking to adjourn
14 the trial date to a date in the first quarter, which I think
15 will provide more certainty for the Court to try all three
16 defendants.

17 THE COURT: You are asking that now?

18 MR. POSCABLO: I am. I was trying to assess what the
19 situation was. I spoke to the government about it, I spoke
20 with defense counsel about it, and I think it is -- the
21 defendants would like to do it all together as well. And given
22 the uncertainty you have whether we are actually going to move
23 forward on October 24 I am just asking for the Court to
24 consider it. That way I know that I will have certainty in
25 October with the other case, and I won't ask for an adjournment

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1 of that case.

2 THE COURT: What's the position of the parties?

3 MR. ALONSO: We would like to go forward on October
4 18, your Honor.

5 THE COURT: It's not October 18, is it?

6 MR. SOBELMAN: Yes.

7 MR. ALONSO: October 18.

8 MR. POSCABLO: 24. I keep messing up those other
9 dates. October 24 is the other date.

10 THE COURT: What is the position of the government?

11 MR. SOBELMAN: Sorry, your Honor, one moment.

12 (Counsel confer)

13 THE COURT: Do you have an incarcerated defendant in
14 the other case?

15 MR. POSCABLO: No, your Honor.

16 THE COURT: How old is that case?

17 MR. POSCABLO: Less than six months, Judge.

18 THE COURT: Make the request for the adjournment
19 there. We are going forward. Let me hear what the government
20 says.

21 MR. SOBELMAN: Your Honor, we don't have an objection
22 to the request.

23 I do note that if we had -- I understand defendant
24 Shah wants to go forward and the Court will consider that.
25 But if Shah also were moved to the first quarter, we could go

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1 ahead on Mr. Allen in October and have the other two
2 defendants in the first quarter of next year, and that would
3 solve the --

4 THE COURT: It doesn't solve my issue of --

5 MR. SOBELMAN: Of not having two trials.

6 THE COURT: Exactly.

7 MR. SOBELMAN: Understood.

8 THE COURT: Make the --

9 MR. POSCABLO: May I just say --

10 MR. SOBELMAN: Your Honor, sorry, they are not
11 duplicative. I'm not sure there would be any overlap in
12 witnesses if that was the structure. Obviously your Honor is
13 going to decide what the best formulation is.

14 THE COURT: There is no overlap? You mean Allen is,
15 in essence, *sui generis* within a conspiracy case?

16 MR. SOBELMAN: No, your Honor, of course not, but in
17 the overall structure of the conspiracy, with the dozens of
18 people we have charged, Brewster and Shah are fairly close in
19 that web. Allen is further away. And so there might be
20 probably one -- we don't know exactly who our witnesses are,
21 but probably one witness who would overlap between the two
22 trials. And otherwise it's not like Brewster and Allen or
23 Shah and Allen ran a floor together or anything like that.
24 They are further away from each other in the conspiracy.

25 So if your Honor will permit, Ms. Fletcher can address

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1 this better than I can.

2 MS. FLETCHER: Sorry, your Honor. I think we
3 appreciate the Court's reluctance to have two trials. We also
4 generally have that reluctance, but what we are trying to
5 grapple with is the uncertainty around getting a trial date in
6 October at all, the fact that the COVID protocol rules preclude
7 us from having three defendants, and that we see, as a matter
8 of efficiency, a potential opportunity to actually just split
9 these defendants up and have what I think would be a relatively
10 short trial of Chad Allen in October and a quarter 1 trial with
11 defendant Brewster and defendant Shah. We sort of view those
12 two trials as -- the sum of them is no greater or smaller than
13 the parts.

14 So there could be, for example, a week and a half
15 long trial of Chad Allen in October, where we understand your
16 Honor may have a number of other trials and could be slated
17 between them, and a longer, two- to three-week trial of
18 defendants Brewster and Shah in the first quarter of next
19 year.

20 We understand Shah's position is that she would like
21 to go forward. We understand Brewster's position is that he
22 does not want to go forward. So we are having this
23 conversation with the Court because we see a potential
24 efficient way to solve this problem and ensure that all
25 defendants are tried, to the extent they want to be, by the

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1 end of Q1 2022, even if it means two trials. Because, as I
2 said -- I think AUSA Sobelman has alluded to this -- we don't
3 know all of our witnesses, but the witnesses that take the
4 most time, as the Court knows, are cooperating witnesses, and
5 I think, based on the landscape as I currently understand it,
6 that there is only one cooperating witness who would testify
7 at a trial of Chad Allen and also testify at a trial of
8 Cameron Brewster and Jen Shah and I'm not even certain of that
9 one. There are no overlapping victims. So it really is
10 possible and perhaps more efficient to split the defendants in
11 that way.

12 THE COURT: Thank you.

13 (Pause)

14 THE COURT: Let me speak to people who can give me a
15 better sense of what it takes to reconfigure the courtrooms for
16 COVID. As of now, we will go on the 18th with three
17 defendants, but I need to think about it. If change my mind on
18 that, I will let the parties know. I don't know when you need
19 to make your request to the Illinois Court. Right now three
20 defendants on the 18th. I guess I will talk to the District
21 Executive's people, the people who did the buildout of the jury
22 boxes. Oh, no, that wouldn't be different. It would be the
23 courtroom that would have to be reconfigured.

24 All right. Let me think about it. Right now three
25 defendants October 18. Thank you.

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1 MR. POSCABLO: Thank you, your Honor.

2 THE COURT: I appreciate everybody being here. It's
3 been a long morning and afternoon. Thank you.

4 COUNSEL: Thank you, your Honor.

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